Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 22 MARCH 30, 1988 No. 12/13

This issue contains:

U.S. Customs Service
T.D. 88–11
General Notice
Proposed Rulemaking
U.S. Court of Appeals for the Federal Circuit
Appeal Nos. 87–1441, 87–1570, and 87–1602
U.S. Court of International Trade
Slip Op. 88–17 Through 88–23
Abstracted Decisions:
Classification: C88/41 Through C88/45
Valuation: V88/7 and V88/21
Appeals of the CAFC
Decisions of the CAFC

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

(T.D. 88–11)

TUNA FISH—TARIFF-RATE QUOTA

THE TARIFF-RATE QUOTA FOR THE CALENDAR YEAR 1988 ON TUNA CLASSIFIABLE UNDER ITEM 112.30, TARIFF SCHEDULES OF THE UNITED STATES (TSUS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1988.

SUMMARY: Each year the tariff-rate quota for tuna fish described in item 112.30, TSUS, is based on the United States pack of canned tuna during the preceding calendar year.

EFFECTIVE DATES: The 1988 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1 through December 31, 1988.

FOR FURTHER INFORMATION CONTACT: Karen L. Cooper, Chief, Quota Branch, Quota and Quality Assurance Division, Office of Trade Operations, U.S. Customs Service, Washington, D.C. 20229, (202–566–8592).

It has now been determined that 85,185,252 pounds of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1988, at the rate of 6 percent ad valorem under item 112.30, TSUS. Any such tuna which is entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under item 112.34, TSUS.

(QUO–1–CO:T:Q:Q)

Dated: March 8, 1988.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, March 15, 1988 (53 FR 8540)]

U.S. Customs Service

General Notice

19 CFR Part 24

CURRENT IRS INTEREST RATE USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of calculation of interest.

SUMMARY: The Tax Reform Act of 1986 established a new method of determining the adjusted rate of interest on applicable overpayments or underpayments of Customs duties. The new method provides a two-tier system based on the short-term Federal rate and is adjusted quarterly. This notice advises the public that the interest rates, as set by the Internal Revenue Service, will be 10 percent for underpayments and 9 percent for overpayments for the quarter beginning April 1, 1988. It is being published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: April 1, 1988.

FOR FURTHER INFORMATION CONTACT: Robert B. Hamilton, Jr., Revenue Branch, National Finance Center, U.S. Customs Service, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1245.

SUPPLEMENTARY INFORMATION:

BACKGROUND

By notice published in the Federal Register on January 5, 1987 (52 FR 255), Customs advised the public that the Tax Reform Act of 1986 (Pub. L. 99–514), amended 26 U.S.C. 6621, mandating a new method of determining the interest rate paid on applicable overpayments or underpayments of Customs duties. The new method provides a two-tier system based on the short-term Federal rate. As amended, 26 U.S.C. 6621 provides that the interest rate that Treasury pays on overpayments will be the short-term Federal rate plus 2 percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus 3 percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less and are to fluctuate quarterly. The rates are determined during the first month of a calendar quarter and become effective for the following quarter.

DETERMINATION

It has been determined that the rates of interest for the period of April 1, 1988–June 30, 1988 are 10 percent for underpayments and 9 percent for overpayments. These rates will remain in effect through June 30, 1988, and are subject to change on July 1, 1988. They will remain in effect until changed by another notice in the Federal Register.

Dated: March 11, 1988.

WM. ROSENBLATT,
Acting Commissioner of Customs.

[Published in the Federal Register, March 21, 1988 (53 FR 9110)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 6

PROPOSED CUSTOMS REGULATIONS AMENDMENT DESIGNATING TAMIAMI AIRPORT, MIAMI, FLORIDA, FOR PRIVATE AIRCRAFT REPORTING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document announces a proposal to amend the Customs Regulations by adding Tamiami Airport, Miami, Florida, to the list of designated airports at which private aircraft arriving in the U.S. from the southern portion of the Western Hemisphere via the U.S./Mexican border, or via the Atlantic, Pacific or Gulf of Mexico coasts, must land for Customs inspection. This proposal is made to help relieve congestion at the seven other designated airports in south Florida, a condition which makes it difficult to effectively conduct Customs private aircraft enforcement program. Public comments are invited on the proposal for consideration before a final decision is reached on this matter.

DATE: Comments must be received on or before May 9, 1988.

ADDRESS: Comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations and Disclosure Law Branch, Room 2324, Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Glenn Ross, Office of Inspection and Control (202–566–5707).

SUPPLEMENTARY INFORMATION:

Background

As part of Customs efforts to combat the problem of drug smuggling by air, in 1975 the Customs Regulations were amended to add a new § 6.14 (19 CFR 6.14), that provides in part that private aircraft arriving in the U.S. via the U.S./Mexican border must provide a notice of intended arrival with Customs (T.D. 75–201; 40 FR 33203). The section further provides that these private aircraft

must land at any one of the designated airports near the U.S./Mexican border. The purpose of this regulation was to provide Customs with increased enforcement efficiency by providing tight control over air traffic arriving from the direction of countries that are major sources of illegal drugs destined for the U.S.

In our diligence to fight the national epidemic of illegal drugs, Customs has amended § 6.14, Customs Regulations, several times since 1975. Amendments have included extending coverage to private aircraft arriving via the Pacific, Gulf of Mexico, or Atlantic coasts (T.D. 83–192; 48 FR 41381); expanding coverage by modifying the definition of private aircraft (T.D. 84–236; 49 46885); extending the coverage to include some flights arriving from Puerto Rico and all flights arriving from the U.S. Virgin Islands, increasing from 15 minutes to one hour the minimum time required for notice to be given prior to penetrating U.S. air space, and requiring aircraft seeking exemption from landing requirements to be equipped with functioning transponders (T.D. 86–72; 51 FR 11004); and removing San Diego International Airport (Lindbergh Field) from the list of designated airports in § 6.14 because Lindbergh Field's distance from the U.S./Mexican border was permitting smugglers to operate in the area (T.D. 86–146; 51 FR 27836).

Customs is now proposing to amend § 6.14(g), which lists designated airports at which subject aircraft must land for Customs inspection, by adding Tamiami Airport, Miami, Florida, to that list.

This proposal is in response to the congested conditions at the other seven airports in southern Florida which are already designated for private aircraft reporting. Those other airports are: Fort Lauderdale Executive Airport and Fort Lauderdale-Hollywood International Airport, in Fort Lauderdale; St. Lucie County Airport, in Fort Pierce; Key West International Airport, in Key West; Miami International Airport and Opa-Locka Airport, in Miami; and Palm Beach International Airport, in West Palm Beach. By increasing the number of airports available at which arriving private aircraft may report, the burden on existing airports should be reduced, and overall enforcement should be enhanced. The proposed designation is a continuation of Customs recent efforts to improve our private aircraft enforcement program.

COMMENTS

Before making a determination on this matter, consideration will be given to any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2324, Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

Because this proposal relates to the organization of Customs it is not a regulation or rule subject to E.O. 12291.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act ("Act") relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to this proposal because it will not have a significant economic impact on a substantial number of small entities. Customs routinely makes adjustments to its field organization to accommodate the volume of Customs related activity throughout the country. Although the proposal may have a limited effect upon some small entities in the area affected, it is not expected to be significant because adjusting the Customs field organization in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

LIST OF SUBJECTS IN 19 CFR PART 6

Customs duties and inspection, Imports, Air carriers, Aircraft, Airports.

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 would continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote. 11), 1624; 49 U.S.C. 1474, 1509.

2. It is proposed to amend § 6.14(g) by inserting, in appropriate alphabetical order, "Miami, Fl." in the column headed "Location", and on the same line, "Tamiami Airport" in the column headed "Name".

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

WILLIAM MEGLEN,
Acting Commissioner of Customs.

Approved: March 1, 1988.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 10, 1988 (53 FR 7766)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87–1441)

E.C. McAfee Co. and St. Paul Fire and Marine Insurance Co., plaintiffs-appellants, and American Air Parcel Forwarding Co., Ltd., plaintiff *v.* United States, U.S. Customs Service and Commissioner of Customs, defendants-appellees

Leonard L. Rosenberg, Sandler & Travis, P.A., of Miami, Florida, argued for plaintiffs-appellants.

Kenneth N. Wolf, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendants-appellees. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge DiCarlo.

(Decided March 1, 1988)

Before Judge Markey, *Chief Judge,* Rich and Nies, *Circuit Judges.*

Nies, *Circuit Judge.*

This is an appeal, pursuant to 28 U.S.C. § 1295(a)(5) (1982), by E.C. McAfee Company and St. Paul Fire and Marine Insurance Company from the final judgment of the United States Court of International Trade in *American Air Parcel Forwarding Co.* v. *United States,* No. 83–7–00995, Slip op. 87–32 (CIT March 20, 1987) (DiCarlo, J.), sustaining the assessment of duties under 19 U.S.C. § 1401a (1982), on the basis of the price paid by the United States customers to Hong Kong distributors for imported, made to measure clothing produced in Hong Kong ("consumer price"). Appellants maintain that the merchandise should be assessed on the basis of the cost to the distributors of tailoring services in Hong Kong with the addition of the cost of fabric and certain other adjustments ("assembly price"). We conclude that appellants' position is correct and, accordingly, reverse the judgment in favor of the United States. codes.

I

American Air Parcel Forwarding Company, Ltd. (AAP), importer of record, is a freight forwarder for Hong Kong distributors of made-to-measure clothing made in Hong Kong for customers in the United States. AAP consolidates the individual shipments of numerous distributors, sends the merchandise to Detroit, files entries for the merchandise, and forwards the clothing to the individual United States customer. McAfee is the customs broker for AAP in this transaction, and St. Paul is the surety.

A stipulation of the parties sets out the following additional facts. Orders for the subject custom-made clothing are taken either in the United States or in Hong Kong. In the former instance, sales representatives of Hong Kong distributors advertise their availability and set up a display of fabrics and styles, usually in a hotel, in the United States. The customer makes a selection, his measurements are taken, and an order form is written up. The customer remits the purchase price to the sales representative. The representative sends the order form to his distributor in Hong Kong. Other transactions originate in retail shops of distributors in Hong Kong, where tourists may place orders. In that instance, a similar procedure is followed in that the clothing is sent via AAP to the United States for forwarding to the United States customer.[1]

In either case, on receipt of an order, the distributors contract with tailors in Hong Kong to produce the clothing. The distributor supplies fabric to the tailor who manufactures the clothing and returns the finished apparel to the distributor. The tailors' manufacturing operation—the "CMT" operation—involves cutting the fabric, sewing the cut parts (making), and supplying the garment's trim, e.g., lining, buttons, etc. Upon receipt of the finished clothing, the distributor packs the clothing, addresses the package to individual customers, obtains quota and visa if necessary, and gives the package to AAP which the latter forwards as part of a consolidated shipment.

The United States Customs Service issued a ruling, *Export Value: Dutiability of Sales from Manufacturers to Distributors,* CLA–2: RRUCV 065056#CW TAA #10, C.S.D. 81–72, 15 Cust. B. & Dec. 876 (Oct. 17, 1980) [hereinafter "TAA #10"], which ruled that "transaction value" for appraisement purposes under section 402 of the Tariff Act of 1930, as amended by section 201 of the Trade Agreements Act of 1979, 19 U.S.C. § 1401a, was established by the "assembly price," i.e., the CMT price paid by the Hong Kong distributors plus the cost of the fabric and other adjustments specified in 19 U.S.C. § 1401a (e.g., packing costs). A year later Customs changed its interpretation and issued another ruling, designated CLA–2–CO:R:CV:V, 542643 TLL, TAA #40 (Oct. 19, 1981) (unpublished) [hereinafter "TAA #40"]. TAA #40 retroactively *revoked*

[1] Garments which are picked up by tourists in Hong Kong are not involved in this case since they are not entered by AAP.

TAA #10 and ruled that transaction value for the subject entries is the U.S. customer's price. Retroactive revocation of TAA #10 caused AAP's entries to be liquidated at substantially higher values than the entered values. Thus, Customs issued bills for increased duties. St. Paul paid the increased duty only on Entry No. 337670, entered on January 2, 1981. A protest was filed challenging the Customs Service's valuation, which was denied. AAP, McAfee, and St. Paul (collectively "the importers") unsuccessfully contested that denial before the Court of International Trade.

II

It is agreed that the valuation of the subject merchandise is its "transaction value." The statutory provisions governing the assessment of duties on the basis of "transaction value" pertinent to this case are the following:

> 19 U.S.C. § 1401a(b)(1). The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—
>
> (A) The packing costs incurred by the buyer with respect to the imported merchandise;
>
> * * * * * * *
>
> (C) the value, apportioned as appropriate, of any assist * * *.

The Customs regulations implementing these provisions include the following:

> **§ 152.103 Transaction value.**
>
> (a) *Price actually paid or payable—*
>
> (1) *General.* In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation. It may be the result of discounts, increases, or negotiations, or may be arrived at by the application of a formula * * *.
>
> * * * * * * *
>
> (3) *Assembled merchandise.* The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value.

19 C.F.R. § 152.103(a) (1987). Subparagraph (3) is in accordance with the legislative history which states:

> In some cases, the price actually paid or payable may represent an amount for assembly of merchandise in which the seller has no interest in the merchandise other than as assembler. In such cases the price actually paid or payable, adjusted by the addition of the value of the components and required adjustments, will form the basis for the transaction value.

Statements of Administrative Action, H.R. Doc. No. 153, 96 Cong., 1st Sess., pt. 2, at 442, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 705. The importers contend that the facts here present the type of assembly operation which Congress contemplated would be used to determine transaction value under section 1401a(b).

The trial court interpreted the above regulations to provide that only if there were no sale of merchandise falling under section 152.103(a)(1) could a price be constructed based on assembly price under section 152.103(a)(3). Finding a sale of clothing between the distributor and the United States customer, the court held that the price of that sale determined transaction value. The court went on to hold that, in any event, the provisions of subparagraph (3) could not apply because the sale between the distributor and tailor was not "for exportation to the United States."

III

The questions raised by this appeal are whether the custom-made clothing is assembled merchandise within the meaning of the regulation and, if so, whether the transaction value of the merchandise should be determined on that basis.

IV

With respect to the question of the meaning of "assembled merchandise," an extant ruling of Treasury, *Value: Appraisement of Women's Wearing Apparel,* CLA–2: RRUCV 542181RP TAA #8, C.S.D. 81–92, 15 Cust. B. & Dec. 921 (Oct. 15, 1980) [hereinafter "TAA #8"], holds that where an importer/buyer purchased piece goods which it supplied to manufacturers (related and unrelated companies) to be made into garments for which service it paid a CMT price, "the transaction value for the merchandise would be represented by the price actually paid or payable for the garments (i.e., the CMT charge paid to the manufacturer) plus applicable additions as specified in section 402(b)(1)(A)–(E)." TAA #8 at 2, 15 Cust. B. & Dec. at 922.[2] The trial court found that TAA #8 was inapplicable here because of a difference in facts. While the facts are different in that TTA #8 does not address custom-made clothing, we conclude that it applies at least to the extent that the CMT operation by Hong Kong tailors must also be considered an "assembly" and the imported goods to be "assembled merchandise" within the meaning of the regulation. *See, e.g., Texas State Comm'n for the Blind* v. *United States,* 796 F.2d 400, 406 (Fed. Cir. 1986) ("authoritative administrative constructions [such as Customs rulings] should be given the deference to which they are entitled") (citing *United States* v. *Turkette,* 452 U.S. 576, 580 (1981)), *cert. denied,* 107 S. Ct. 874 (1987); *Julius Goldman's Egg City* v. *United States,* 697 F.2d 1051, 1055 (Fed. Cir.) (deferential standard applies to review of

[2] The fabric in such case is treated as an "assist" under section 1401a(b)(1)(C).

agency's interpretation of its regulations), *cert. denied,* 464 U.S. 814 (1983).[3]

V

Determining that the transaction between the distributors and tailors results in "assembled merchandise" does not, however, *ipso facto,* mean that valuation on the basis of assembly price is appropriate. The trial court construed the regulations as establishing a preference for a sale of goods price (here, consumer price) over a sale of services price (assembly price):

> Since there is a sale of the exported merchandise between the Hong Kong distributor and Amercian customers in this case, the price paid or payable is determined under subsection (1) of the regulation [i.e., section 152.103(a)(1)], and there is no reason to resort to subsection (3) [section 152.103(a)(3)].

Slip. op. at 7.

We cannot agree with that interpretation, and we note that the government does not advance that position on appeal. Subsection (a)(1) of section 152.103 is a general, all-inclusive provision which states only:

> In determining transaction value, the price actually paid or payable will be considered without regard to its method of derivation.

Subsection (a)(3) states that "the price actually paid" may represent the amount for assembly (plus adjustments). We read subsection (a)(1) to encompass all prices which may be calculated to obtain transaction value, including a price calculated on the basis of assembly. No hierarchy of (1) over (3) is possible because (1) includes (3). Thus, both consumer price and assembly price are viable transaction values under the regulations, and we must look elsewhere for guidance on which is preferred.

The statute provides that transaction value is based on the price for the merchandise "when sold for exportation to the United States." In *United States* v. *Getz Bros. & Co.,* 55 CCPA 11 (1967), a precedential decision of the Court of Customs and Patent Appeals, a similar, three-tiered, distribution situation was presented. While the *Getz* case was decided under 19 U.S.C. § 1401a(b) as it appeared before amendment by the Trade Agreements Act of 1979, the language of the earlier statute is not significantly different from the quoted provision of the current statute. The issue in *Getz* was whether valuation of certain plywood should be at the manufacturer's price to a foreign middleman or that middleman's price to the United States customer. Two holdings in that case are significant here. First, a sale need not be to purchasers located in the United

[3] The government's argument that transaction value for goods can never be based on the price of services for making the goods is contradicted by TAA #8, as well as by the legislative history. *See, e.g., Alaskan Arctic Gas Pipeline Co.* v. *United States,* 831 F.2d 1043, 1046 (Fed. Cir. 1987) (when statutory language fails to provide adequate guidance, we must read legislative history of statute to determine Congress' intent).

States to provide the basis for valuation. Second, if the transaction between the manufacturer and the middleman falls within the statutory provision for valuation, the manufacturer's price, rather than the price from the middleman to his customer, is used for appraisal. *Id.* at 18; *R.J. Saunders & Co.* v. *United States*, 42 CCPA 55, 59 (1954); *United States* v. *S.S. Kresge Co.*, 26 CCPA 349, 352 (1939); *accord Rodriguez* v. *United States*, 23 Cust. Ct. 296, 300 (1949) ("no need to consider the dealers' resale prices since we have a manufacturer's price which meets the statutory requirement"). *See also* R. Sturm, *Customs Law & Administration* § 41.2 at 254 (1980) ("Where a manufacturer or original seller and a dealer or 'trading house' both sell the merchandise at a price which meets the statutory standards for [valuation], the manufacturer's price is the basis of appraisement.").

The cited cases assume, without explanation, that if the importer establishes that his claimed, lower valuation falls within the statute, the importer is entitled to the benefit of that valuation even though Customs' valuation also satisfies the same statutory requirements. While an argument could be made that Customs should have the option to impose the higher duty in such circumstances, the cited precedent is to the contrary.

Thus, the issue here comes down to the factual question whether the merchandise being assembled by the tailors was "for exportation to the United States" so as to meet the statutory standard. The trial court found that "the transaction between the tailor and distributor is not one 'for exportation to the United States' " because "the tailor deals only with the distributor and 'may or may not know the identity or address of the customer,' stipulation at 5." Slip op. at 7. The importers argue on appeal that the tailors receive information indicating that the tailor-made garment is for a United States consumer on each order form and that, in any event, the facts here establish that the clothing is being assembled for export to the United States regardless of the tailors' actual knowledge.

We conclude that the tailors' actual knowledge that the particular suits are destined for the United States is irrelevant. Where clothing is made-to-measure for individual United States customers and ultimately sent to those customers, the reality of the transaction between the distributors and the tailors is that the goods, at the time of the transaction between the distributor and tailors, are "for exportation to the United States." Apart from this factor, there is no dispute that the merchandise was being made for export to the United States. Accordingly, we hold that the trial court's finding to the contrary is clearly erroneous. *See, e.g., Daw Indus., Inc.* v. *United States*, 714 F.2d 1140, 1142 & n.6 (Fed. Cir. 1983) (clearly erroneous standard of review applies to Court of International Trade's findings of fact) (citing *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287–88 (1982), for the statement that "in Fed. R. Civ. P. 52(a), the 'clearly erroneous' standard applies to *all* questions of fact").

A determination that goods are being sold or assembled for exportation to the United States is fact-specific and can only be made on a case-by-case basis. Thus, while the analysis here sets forth a general approach to the problem, we wish to make clear that all assembly transactions where the assembled goods eventually reached the United States do not *ipso facto* provide the basis for valuation under section 1401a. *Cf., e.g., Mitsui & Co.* v. *United States,* 68 Cust. Ct. 266, 270 (1972) (when only evidence supporting destiny of merchandise was "testimony that the merchandise was marked and numbered for the United States by [the manufacturer,] * * * [s]uch testimony is not comprehensive and as forceful as that in *United States* v. *Getz"* and sale by Japanese manufacturer to Japanese trading company, which shipped and sold to United States customers, found not for export to United States). The merchandise at issue is unique in that, from the time of the initial contact until eventual importation, the goods in question were being made for a specific United States consumer, not the United States market generally. That should not be taken to mean that only goods tailor-made for a United States individual are goods clearly destined for the exportation to the United States, but rather that it is, in this case, the factor which *compels* a *reversal* of the finding that the goods were not for exportation to the United States at the time of assembly.

VI

As part of this appeal, McAfee and St. Paul have challenged the order of the Court of International Trade in *American Air Parcel Forwarding Co.* v. *United States,* 587 F. Supp. 550 (CIT 1984) (Carman, J.), granting the government's partial summary judgment motion upholding the retroactive revocation of a Customs Service ruling which had evaluated the merchandise at issue at assembly price. For background on that issue, see *Amercian Air Parcel Forwarding Co.* v. *United States,* 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied,* 466 U.S. 937 (1984). In view of our disposition of the appeal on the merits, we need not reach the retroactive revocation issue. We deem it advisable to vacate the published order of the Court of International Trade, however, to negate its precedential value.

Conclusion

For the foregoing reasons, the judgment of the Court of International Trade is reversed.

REVERSED

(Appeal No. 87–1570)

FUNDICAO TUPY S.A. AND TUPY AMERICAN FOUNDRY CORP., PLAINTIFFS-APPELLANTS *v.* UNITED STATES AND CAST IRON PIPE FITTINGS COMMITTEE, DEFENDANTS-APPELLEES

Bernard J. Babb, Freeman, Wasserman & Schneider, of New York, New York, argued for plaintiffs-appellants. With him on the brief were *Jerry P. Wiskin* and *Patrick C. Reed.*

A. Douglas Melamed, Wilmer, Cutler & Pickering, of Washington, D.C., argued for Amicus Curiae, OKI Electric Industry Company, Ltd. With him on the brief were *John D. Greenwald* and *Barry A. Spergel.*

Elizabeth Seastrum, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee, the United States. With her on the brief were *Richard K. Willard,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Robert H. Brumley,* Deputy General Counsel, *M. Jean Anderson,* Chief Counsel for International Trade and *Craig L. Jackson,* Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel. *Lawrence J. Bogard,* Rose, Schmidt, Hasley & DiSalle, of Washington, D.C., argued for defendant-appellee Cast Iron Pipe Fitting Committee.

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

(Decided March 14, 1988)

Before FRIEDMAN, RICH, and NIES, *Circuit Judges.*

NIES, *Circuit Judge.*

Fundicao Tupy S.A. and Tupy American Foundry Corporation (collectively "Tupy") appeal the United States Court of International Trade's decision in *Fundicao Tupy S.A.* v. *United States,* 669 F. Supp. 437 (CIT 1987), denying Tupy's motion for a preliminary injunction to prevent the government from liquidating certain entries pending the court's decision on the merits of Tupy's challenge to the underlying Antidumping Duty Order. In view of the trial court's intervening decision on the merits, we dismiss the appeal as moot.

I

Tupy produces malleable, cast-iron pipe in Brazil and imports it to the United States. The Cast Iron Pipe Fittings Committee petitioned the United States Commerce Department's International Trade Administration ("Commerce") and the United States International Trade Commission ("Commission") for review of the imports, alleging that they injured a domestic industry. Commerce determined Tupy sold at less than fair value (LTFV). 51 Fed. Reg. 10,897 (March 31, 1986). The Commission determined injury to a domestic industry existed. 51 Fed. Reg. 18,670 (May 21, 1986). Accordingly, an Antidumping Duty Order issued. 51 Fed. Reg. 18,640 (May 21, 1986). Thereafter, Tupy's unliquidated entries were assessed antidumping duties and Tupy paid a deposit, based on the amount of

estimated duties assessed, at the time of entry. Before the entries were liquidated, however, Tupy sought to enjoin liquidation pending the Court of International Trade's decision on the merits of Tupy's challenge to the underlying Antidumping Duty Order. That challenge asserted that Commerce's LTFV determination and the Commission's injury determination were each wrong.

The court sat as a three-judge panel (Watson, DiCarlo, & Tsoucalas, JJ.) and denied Tupy's motion for a preliminary injunction, finding that Tupy had failed to prove immediate and irreparable harm, one of the four factors considered in deciding whether to grant such an injunction. *See, e.g., Matsushita Elec. Indus. Co.* v. *United States,* 823 F.2d 505, 509 (Fed. Cir. 1987) (reversing grant of preliminary injunction, because finding on irreparable harm factor clearly erroneous, without considering other three factors—likelihood of success on merits, balance of hardships, public interest). Noting that Judge Carman had granted a preliminary injunction upon similar facts in *OKI Electric Industry Co.* v. *United States,* No. 86–07–00833, slip op. 87–100 (CIT August 28, 1987), decided after the panel's denial in *Fundicao Tupy S.A.,* the panel granted an injunction pending Tupy's appeal to this court of its decision to deny the preliminary injunction. Before we heard oral argument in the appeal, however, the same panel entered a final judgment in the case affirming the final determinations of Commerce and the Commission and dismissing Tupy's complaint. *Fundicao Tupy S.A.* v. *United States,* No. 86–06–00765, slip op. 88–3 (CIT Jan. 12, 1988).

II

After initial briefing, the government called our attention to the Court of International Trade's final decision on the merits of the case and suggested that this appeal had become moot. Tupy advised us at the hearing that it had taken an appeal from the final judgment and argued that its request for a preliminary injunction should be deemed to encompass the appeal, in addition to the trial, noting its motion for a preliminary injunction sought relief "during the pendency of this action." Consequently, per Tupy, this interlocutory appeal had not become moot.

We cannot agree with Tupy's argument. "The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be had." *University of Texas* v. *Camenisch,* 451 U.S. 390, 395 (1980). Such an injunction is appropriate when the policy of preserving the court's power to decide the merits of a case outweighs the burden of imposing an interim restraint before it can do so. Thus, although a preliminary injunction is usually not subject to a fixed time limitation, it "is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause." 7 J. Moore, J. Lucas, & K. Sinclair, Jr., *Moore's Federal Practice* ¶65.07 at 65–114 to 65–115 (2d ed. 1987) (citation omit-

ted). *See also Gaulter* v. *Capdeboscq*, 423 F. Supp. 823, 825–26 (E.D. La. 1976) (preliminary injunction has no effect after trial on merits), *aff'd in part & remanded*, 594 F.2d 129 (5th Cir. 1979) (affirming dissolution of injunction); 11 C. Wright & A. Milier, *Federal Practice & Procedure: Civil* § 2947 at 426–27 (2d ed. 1973) ("a preliminary injunction normally lasts until the completion of the trial on the merits, unless it is dissolved earlier"); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure: Jurisdiction* § 3921 at 12–13 (1977) (issues arising from interlocutory injunction ruling may become moot by the time of final judgment).

The Court of International Trade has reached and decided the merits of Tupy's case. There is no longer any need to preserve the trial court's power to provide an effective remedy on the merits, which is the purpose of a preliminary injunction. Moreover, because an appeal has been taken, the trial court's jurisdiction is limited:

> The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. It divests the district court of authority to proceed further with respect to such matters, except in aid of the appeal [e.g., granting a stay to preserve the *status quo* pending the appeal, Fed. R. Civ. P. 62; Fed. R. App. P. 8], or to correct clerical mistakes under Rule 60(a) of the Federal Rules of Civil Procedure * * *, or in aid of execution of a judgment that has not been superseded, until the district court receives the mandate of the court of appeals.

9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶203.11 at 3–44 to 3–47 (2d ed. 1986) (footnotes omitted). Appellant Tupy is pressing for this court to direct the trial court to enter an injunction in a case over which the trial court is presently without jurisdiction. Plainly that relief is unavailable. Thus, we decline to decide whether the preliminary injunction should have been denied; the question is moot. Appellant Tupy's remedy, if any, lies in the post-judgment rules.

In view of the dismissal of this interlocutory appeal, the Court of International Trade's published order and opinion on the preliminary injunction issue, having been timely appealed but now unreviewable, has no precedential value. *Cf.* 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3533.10 at 442 (2d ed. 1984) ("If the appellate court finds the dispute so far moot that review should be denied, the denial of review should automatically defeat any further consequences of the unreviewed judgment."). Because an appeal is pending from the final judgment, however, it would be inappropriate at this time to remand to the trial court with a direction to vacate its order.

III

For the foregoing reasons, the appeal is dismissed.

DISMISSED

(Appeal No. 87–1602)

OMNI U.S.A., INC, PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Andrew P. Vance, Barnes, Richardson & Colburn, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Robert H. Schor.*

Sheila N. Ziff, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Velta A. Melnbrences,* Assistant Director. Also on the brief was *Alfonso Robles,* Attorney Advisor, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

(Decided March 2, 1988)

Before BISSELL, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and ARCHER, *Circuit Judge.*

NICHOLS, *Senior Circuit Judge.*

Omni U.S.A., Inc. (Omni) appeals a judgment of the Court of International Trade dismissing Omni's complaint upon defendant's motion for summary judgment. The court held it had no jurisdiction because Omni's reliquidation request under 19 U.S.C. § 1520(c) had been untimely. 11 CIT ——, 663 F. Supp. 1130 (1987). We agree and affirm.

FACTS

Omni, in 1980, made various entries of Japanese fasteners through the port of Seattle. There was at that time a Treasury order, TD 79–158, 44 Fed. Reg. 31972 (June 4, 1979), requiring deposit of estimated countervailing duties (CVD) upon entry of such articles, and deposit was accordingly required. The order gave notice the estimates were subject to review. By Exec. Order No. 12,188, effective January 2, 1980, 3 C.F.R. at 131 (1981), the President had transferred administration of such countervailing duties to the Department of Commerce, which published a notice of its intent to review all CVD orders then in effect, but by inadvertence and mistake the notice failed to list, with other orders, TD 79–158. Customs therefore failed to hold the liquidation of the entries involved in

this litigation in suspense, as it should have done, and liquidated at the entered rates including the deposits for estimated CVD. These were at the rates of 4.2 or 4 percent. By a further mistake, Omni failed to realize that this had occurred. It is not disputed that proper constructive notice was given by posting in the customhouse, and counsel says Omni simply failed to observe the unfavorable significance of liquidations "as entered," in that context. Later on Commerce, on its review, determined that no CVD was owing on 1980 entries of these fasteners and Omni expected to commence receiving refunds as other importers were doing. Only too late did it realize, counsel says, that it was precluded from receiving refunds by the finality of the erroneous liquidations. On October 13, 1982, it requested reliquidations under authority of 19 U.S.C. § 1520(c)(1), but this request was over a year after all the liquidations and therefore came too late to activate the statute according to its terms. Therefore, the original liquidations were considered final and binding on all persons under section 1514. Omni, however, protested the section 1520 refusal to reliquidate within the required time after the refusal.

THE STATUTE

Title 19 U.S.C. § 1520 reads in part as follows:

Cases in which refunds authorized

(a) The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

(1) Excess deposits.—Whenever it is ascertained on liquidation or reliquidation of an entry that more money has been deposited or paid as duties than was required by law to be so deposited or paid;

* * * * * * *

Authorization of appropriations

(b) The necessary moneys to make such refunds are authorized to be appropriate annually from the general fund of the Treasury.

Reliquidation of entry

(c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction; or

* * * * * * *

DISCUSSION

I

Section 1520(c)(1) appears to fit the present case like a glove. It is a statutory instrumentality that is, according to its terms, exactly and precisely suited to deal with an instance, such as here described: customs officers have liquidated entries "as entered" when they should not have done do, because somebody inadvertently failed to inform them by suitable listing that entries of Japanese fasteners were to be suspended from liquidation pending review by the new masters of the CVD cases, at the Department of Commerce. It is an "other inadvertence not amounting to an error in the construction of a law, adverse to the importer * * *." This is too obvious to dispute. If Omni had alerted customs to the error it had committed within a year, its right remained to protest any refusal to reliquidate under section 1514, and to carry the case to the court. On the other hand, the chance for customs to correct its own errors was also preserved, and following the statute would save customs from having to be a defendant because of an error it was ready to acknowledge. If customs elected to correct an acknowledged error, section 1520(a) gave the requisite authority to pay the refunds out of the annual Treasury appropriation. Without this added authority, acknowledgement of the mistake would have been an academic exercise. Further, the one-year limitation assured that whatever errors might lurk in the record would cease to have practical significance after a short time had elapsed—short in the eyes of history—but long enough for an informed and reasoned business decision. It is noteworthy that section 1520(c)(1) is for the protection of importers and there is no correlative provision for increase of duties in case the error was adverse to the government.

This court has several times held that statutory procedures for administrative correction of errors and for judicial review of refusal to acknowledge or correct error, are binding on all concerned, including the time limitations within which valid actions may be taken. The most recent instance is *National Corn Growers Association* v. *Baker,* No. 87–1147 (slip op. Feb 9, 1988). In that opinion, others are cited and quoted. Our adherence to this salutary rule has been undeviating.

Since nobody brought the errors to the attention of the appropriate customs officers within a year of the date of liquidation, authority to correct them lapsed according to the term of section 1520(c)(1), the refusal by customs to correct them upon untimely notice was correct, and was the only course open to them. It is the duty of Congress to provide for payment of the just debts of the United States (Const. art. I, sec. 8), but Congress also has authority, not disputed here, to quiet money claims against the United States, not asserted according to reasonable procedures Congress has prescribed. The

only question Omni raises is whether Congress has effectively done so.

II

National Corngrowers leaves open any possible instance of a void liquidation. The challenge Omni posed before the Court of International Trade, and here, was that because the purported liquidations were *ultra vires,* they were also null and void. Therefore, the court must pretend they did not occur. Since there were no liquidations, there was nothing for section 1520 to apply to and neither it nor its time limitations apply at all. Asked how then he would be able to get refunds out of the Treasury, since section 1520(a) would not apply, counsel responded that he relied on equitable relief under 28 U.S.C. § 1581(i).

The complaint in the Court of International Trade pursues relief under three counts. Court I is for a taking without due process of law in violation of the fifth amendment, and alleges unequal assessment of duties violating article I, section 8 of the Constitution. Count II alleges the section 1520(c) petition was timely and retention of the money results in unjust enrichment. Count III alleges the protest was timely since the entries had been liquidated without authority of law. While Omni asserts before us that notice of the liquidations was inadequate, there is no count based on that issue and the Court of International Trade does not mention it. From statements in oral argument, we believe the concentration really is not that notice was not given, but notice that certain entries were "liquidated as entered" did not alert Omni, or its customhouse broker, that a mistake had been made adverse to it. We think the adequacy of notice is not a separate issue for us to decide, but an added circumstance for the assertion or unjust enrichment.

The essence of the argument, to which all else is adornment, is that the Court of International Trade wrongly cited *United States* v. *A. N. Deringer, Inc.*, 593 F.2d 1015 (CCPA 1979), as authority rejecting the void liquidation theory as no longer valid in this court.

In *Deringer* our predecessor, the Court of Customs and Patent Appeals, was asked to overrule two of its previous holdings, *United States* v. *Cajo Trading, Inc.*, 55 CCPA (Customs) 61, 403 F.2d 268, *cert. denied*, 393 U.S. 827 (1968), and *United States* v. *C. O. Mason, Inc.*, 51 CCPA (Customs) 107 (1964), *cert. denied*, 379 U.S. 999 (1965). Those two cases applied the "void liquidation" theory to arrange for the survival of certain issues which should have been laid to rest by failure to follow statutory protest and review procedures. The court in *Deringer* declined to overrule them saying that Congress had already done so. In support of that statement it referred to 19 U.S.C. § 1500(d), *as amended* in 1970, which eliminated prior language as to what customs officers should do "as provided by law" which language had been relied on by the court in *Mason* as the basis for the

void liquidations doctrine. 51 CCPA (Customs) at 113. *Deringer* now stated at 593 F.2d 1020–21:

> Removal of this stipulation further enhances what we perceive to be a pervasive requirement throughout the statute to channel all nonexcepted protests through § 1514 even when those protests go to the legality of a custom official's [sic] action.
>
> Since the protest to the liquidation was not timely filed, the complaint was properly dismissed although the correct basis is lack of jurisdiction.

We detect in this language a certain want of enthusiasm for the void liquidation notion as stated in the *Cajo* and *Mason* cases. Perhaps some relief was felt that the need to consider overruling them did not arise. Since section 1500(d) as revised in 1970 is still in the statute, clearly we are not obliged to follow *Cajo* and *Mason*. As applied to the present law, they either were never authority, or if they were, are discredited. Our present appellant argues that the court in *Deringer* misapprehended the purpose of the change, which was to restate the duties of the former collectors and appraisers of customs, offices which before 1970 had been merged into a single person the statute since 1970 had been merged into a single person the statute since 1970 has called "the appropriate customs officer." Suppose this is true, it does not restore *Cajo* and *Mason* to any position requiring obeisance by us.

Our want of enthusiasm for the void liquidations doctrine matches that of the *Deringer* court. It appears to be an abstraction having no function except to thwart the efforts of Congress to identify issues of fact and law for prompt administrative or judicial disposition, and to put permanently to rest issues not thus promptly identified for disposition. Specifically with respect to section 1520(c)(1), the doctrine is invoked to make section 1520(c)(1) inapplicable to a case where it applies by its own plain language and is needed as much as anywhere. No one could impute to Congress any rational reason for excluding section 1520(c)(1) from applying because it was a particularly egregious mistake, the overlooking of an executive order transferring a function to another government agency. Moreover, section 1520(c)(1) does not apply to mistaken liquidation only. It applies to "other customs transactions." If a liquidation is not a liquidation because it is void, why is it not an "other customs transaction?"

Appellant's view, if it prevailed, apparently would, whenever applicable, deny customs officials the authority they now have to correct mistakes and refund overpayments. The sole authority to do this would reside in the court's supposed equitable powers which, however, are not as sweeping as appellant supposes in view of the analysis in *National Corngrowers* and other cases. Suppose they are broad enough, it is hardly a result we would care for to compel litigation when there is no real dispute, simply because customs of-

ficers cannot correct what they recognize as errors without colliding with this mysterious doctrine.

Accordingly, we agree with the Court of International Trade that occasion to apply equitable doctrines under the supposed authority of 28 U.S.C. § 1581(i) does not arise because the legal remedy is adequate. It is not made inadequate simply because appellant failed to invoke it within the time frame it prescribes. *Miller & Co.* v. *United States,* 824 F.2d 961, 964, —— Fed. Cir. (T) —— (1987), *cert. denied,* 56 U.S.L.W. 3497 (1988). *See also American Air Parcel Forwarding Co.* v. *United States,* 718 F.2d 1546, 1551, 2 Fed. Cir. (T) 1, 6–7, *cert. denied,* 466 U.S. 937 (1984); *United States* v. *Uniroyal, Inc.*, 687 F.2d 467, 471 (CCPA 1982).

CONCLUSION

The Court of International Trade rightly dismissed the complaint in this case because it was founded on a refusal to reliquidate an erroneous liquidation under 19 U.S.C. § 1520(c)(1), which refusal was justified because the error had not been brought to the attention of customs officials within the time prescribed in the statute, and therefore jurisdiction to effect correction under that statute had lapsed.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–17)

TOMOEGAWA USA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-6-00853

Before RE, *Judge.*

MEMORANDUM OPINION AND ORDER

The Customs Service classified certain imported toner and developer under the basket provision for chemical mixtures, not specially provided for under items 432.20 and 432.25, TSUS. The classification, however, was based on erroneous information and the government advanced several alternative classifications including, "[p]hotographic chemicals," under items 405.20 and 408.41, TSUS. Plaintiff contests the original classification and also the government's alternatives, and contends that the merchandise is properly classifiable as "[o]ther inks" under item 474.26, TSUS.

Held: The toner and developer are properly classifiable as "[p]hotographic chemicals," under items 405.20 in 1980, and 408.41 in 1981, TSUS.

[Judgment for defendant.]

(Decided February 10, 1988)

Mandel and Grunfeld, (Steven P. Florsheim), for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Barbara M. Epstein* and *Nancy E. Reich* at trial, *Michael T. Ambrosino* on the brief), for defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan and described on the commercial invoices as "toner," "dry imaging ink," or "developer."

In 1980 the merchandise was classified by the Customs Service under the basket provision for chemical mixtures, not specially provided for, under item 432.20 of the Tariff Schedules of the United States (TSUS) and also in 1981 under item 432.25. Consequently, the Customs Service assessed duty on the component of the mixture bearing the highest rate, which it deemed at the time to be polyethylene resins dutiable under item 445.30, TSUS, at a rate of 1.3 per centum per pound plus 10 per centum *ad valorem* in 1980, and 13 per centum *ad valorem* in 1981.

Plaintiff protests this classification, and contends that all of the imported substances are inks, namely, electrostatic inks, and are properly classifiable as "[o]ther inks" under item 474.26, TSUS, at the rate of 2 per centum *ad valorem* for all of the dates of entry. In the alternative, plaintiff asserts that the merchandise described in the commercial invoices as "developer" is properly classifiable under the same provisions assigned by Customs, i.e., item 432.20 in 1980, or item 432.25 in 1981, but at the lower duty rates of 4.8 per centum *ad valorem* in 1980 or 4.7 per centum *ad valorem* in 1981.

After receiving a classified list of the components of the imported merchandise, the Customs Service learned that the merchandise did not contain polyethylene resins. As a consequence, the government advanced several alternative classifications. It is the government's primary contention that the toner and developer are properly classifiable as "[p]hotographic chemicals," under items 405.20, TSUS, in 1980 and 408.41, TSUS, in 1981.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified under:

Schedule 4, Part 2:

Subpart E.—Chemical Mixtures

Mixtures not specially provided for:

* * * * * * *

Other:

* * * * * * *

432.20 432.25	(1980) (1981)	Other.....	4.8% *ad val.* (4.7% *ad* val. (1981)), but not less than the highest applicable to any component material.

* * * * * * *

Synthetic plastics materials:

* * * * * * *

445.30		Polyethylene resins.....	1.3 ¢ per lb. plus 10% *ad val.* (1980) 13.6% *ad. val.* (1981)

Claimed under:

Schedule 4, Part 9:

Inks and ink powders:

* * * * * * *

474.26		Other inks.....	2% *ad val.*

Alternative claim of the government:

Schedule 4, Part 1:

Subpart C—Finished Organic Chemical Products

* * * * * * *

Products obtained, derived, or manufactured in whole or in part from any product provided for in subpart A or B of this part:

* * * * * * *

405.20	(1980)	Photographic chemicals...	0.3 ¢ per lb. plus 19% *ad val.*
408.41	(1981)	Photographic chemicals...	18.1% *ad val.*

Additional alternative claim of the government:

Colors, dyes, stains, and related products:

* * * * * * *

Colors, dyes and stains (except toners), whether soluble or not in water, obtained, derived or manufactured in whole or in part from any product provided for in subpart A or B of this part:

* * * * * * *

406.50	(1980)	Other.....	20% *ad val.*
410.22	(1981)	Other.....	18% *ad val.*

The question presented is whether, within the meaning of the tariff provisions, the imported merchandise is dutiable as "[o]ther inks," under item 474.26, as claimed by plaintiff, or as "[p]hotographic chemicals" under items 405.20 in 1980, and 408.41 in 1981, as contended by the government. In this case, there is no presumption of correctness that attaches to the government's classification, and the court must consider both the importer's and the government's claimed classifications.

When the classification of the Customs Service is admittedly erroneous or made in error, there is no presumption of correctness and the importer does not have the burden of overcoming the statutory presumption. *See United States* v. *Magnus, Mabee & Reynard, Inc.*, 39 CCPA 1, 7, C.A.D. 455 (1951); *see also* 28 U.S.C. § 2639 (1982). Moreover, the presumption of correctness does not extend to the new claims of the government. *See J.M. Rodgers Co., Inc.* v. *United States*, 59 Cust. Ct. 91, 95, 273 F. Supp. 442, 445 (1967). Nevertheless, the importer must offer sufficient evidence to prove its claim. *United States* v. *Magnus, Mabee & Reynard, Inc.*, 39 CCPA at 7. If the plaintiff establishes a prima facie case, the government has the burden of going forward with evidence to rebut or negate plaintiff's case. *See Sanyo Elec. Inc.* v. *United States*, 84 Cust. Ct. 167, 179, 496 F. Supp. 1311, 1320 (1980) (citing *E.R. Squibb & Sons, Inc.* v. *United States*, 75 Cust. Ct. 193, 196, C.R.D. 75–7 (1975)), *aff'd*, 68 CCPA 14, 642 F.2d 435 (1981).

The imported merchandise consists of three types of dry powder substances, monocomponent toner, toner for two-component systems, and developer. Both toner and developer are essential elements of the electrophotographic process. This process is of significant practical value, and is utilized in office photocopy machines, in the printing industry, and in office printing devices, such as laser printers and facsimile machines. The powders at issue in this case were developed for use in various office copy machines.

The monocomponent toners consist of magnetic iron (magnetite) particles incapsulated in toner, which consists of resinous materials, carbon black, and, at times, a dye. The two-component systems consist of both toner and developer. The toner is manufactured by mixing all of its ingredients, heating and cooling it, and then grinding it to achieve a desired particle size. Developer is a mixture of approximately 90% iron powder and 10% toner. When necessary, dyes are used in small quantities to effect the tint or color of the reproduction.

Toner is defined as "[t]he fine, black, resinous powder used in electrostatic imaging processes to make an electrostatic image readable; the toner is either deposited directly on coated paper or transferred from a charged surface to ordinary paper, then fused to the paper by heating." *McGraw-Hill Dictionary of Scientific and Technical Terms* 1656 (3d ed. 1984).

Plaintiff described the function of toner and the electrophotographic process as follows:

> Xerography, or plain paper copying with toner, is basically a five-step process: (1) a photoconductive drum or belt is given a uniform positive electrical charge; (2) the drum's charged surface is exposed just like a photographic plate, by reflecting an image of the original document to be copied through a lens; (3) developer beads carry negatively-charged toner particles to the positively-charged image areas on the drum, forming a powder image of the original; (4) a positively-charged sheet of paper comes in contact with the powder image on the drum and electrically attracts the toner particles, thereby transferring the image to the paper; (5) the surface of the paper is heated under pressure, melting the toner powder image and fusing it to the paper.

Plaintiff maintains that toner is equivalent to ink because it is often referred to as ink, or dry ink, and also because toner is composed of the same basic ingredients as ink, a resinous vehicle and a colorant, such as carbon black. Plaintiff notes that toner has the same basic purpose as ink, that is, "to impart a printed image upon paper (or other suitable substrate)." Plaintiff concedes that developer is not commonly referred to as ink, but contends that toner, which plaintiff classifies as ink, is the only active ingredient in developer. Nevertheless, plaintiff acknowledges that the court may deem the developer not simply to be ink, but, rather, a mixture of

ink and iron powder. Hence, it submits an alternative classification for developer under the basket provision for chemical mixtures not specially provided for, under item 432.20 in 1980, and item 432.25 in 1981.

The defendant contends that plaintiff's proffered classifications are fatally flawed because toners and developers do not contain a liquid, and therefore are not ink within the meaning of the appropriate tariff provisions. The defendant maintains that the toners and developers function as part of a photographic process, and therefore are photographic chemicals.

In order to determine whether the imported merchandise is ink, the court must ascertain the meaning of ink as used by Congress in the tariff schedules. It is a well-established principle of customs law that in the absence of evidence to the contrary, " '[t]he meaning of a tariff term is presumed to be the same as its common or dictionary meaning * * *.' " *See Rohm & Haas Co.* v. *United States,* 727 F.2d 1095, 1097 (Fed. Cir. 1984) (quoting *Bentkamp* v. *United States,* 40 CCPA 70, 78 (1952)). Another basic principle is that the "common meaning of a tariff term is not a question of fact, but a question of law to be decided by the court." *See Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, 16, 468 F.Supp. 1318, 1321, *aff'd,* 67 CCPA 32, 612 F. 2d 1283 (1979). Consequently, to determine whether the imported material is "ink" within the tariff schedules, the court must consider not only the testimony offered at trial, but also the pertinent judicial authority as well as lexicographic and scientific definitions.

It is the plaintiff's primary contention that the merchandise consists of inks, and is properly classifiable as "[o]ther inks," under item 474.26, TSUS. While acknowledging that most "traditional" inks are in liquid form, plaintiff notes that the ink provision is an *eo nomine* designation, which, absent demonstrated legislative intent to the contrary, includes all forms of the article. *See NEC America, Inc.* v. *United States,* 8 CIT 184, 186, 596 F. Supp. 466, 468 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985).

To support its contention that the toner and the developer should be classified as inks, the plaintiff introduced evidence that the type of merchandise in question is commonly referred to in the trade as "dry ink." It also noted that the substances are referred to as inks in certain publications of the United States International Trade Commission.

The plaintiff asserts that ink can take a form other than liquid, and cites certain lexicographic sources. Plaintiff notes that the *Funk & Wagnells New Standard Dictionary of the English Language* 1265 (1942) defines the term ink as "[a] colored liquid or viscous substance used in writing, drawing or printing; also, a solid mixture, as of pigments, used by lithographers in forming a rubbed tint * * *." In addition, plaintiff cites the *McGraw-Hill Encyclopedia of Science & Technology* 159 (5th ed. 1982), which defines ink as

"[a] dispersion of a pigment or a solution of a dye in a carrier vehicle, yielding a fluid, paste, or powder to be applied to and 'dried' on a substrate." At trial, plaintiff called two witnesses. The first witness, Mr. Shapoor Azari, who holds a Bachelor of Science degree in chemistry, and is the Vice President of Operations for the plaintiff, Tomoegawa, USA, Inc., testified that, in his opinion, the merchandise in issue is ink, adding that "there are many similarities [in] both printing ink and toner * * *." He noted that they have the same type of ingredients as well as a common source for raw materials, and thay they are used for the same purpose, i.e., "to impart a developed image to a substrate."

Plaintiff's second witness, Dr. Thomas J. Kucera, a self-employed chemical and reprographic consultant who holds a Ph.D. in organic chemistry and chemical engineering, agreed with Mr. Azari that the merchandise is ink. He testified that toners and developers have been referred to "almost continuously * * * by technical people, laboratory people, trade people, and people in general" as dry inks.

Plaintiff also relies on the fact, conceded by the defendant, that the toner and developer contain the same basic elements as ink. Although the existence of these ingredients is relevant, plaintiff is unable to distinguish the clear and categorical definition of ink established by this court in *Corporacion Sublistatica, S.A.* v. *United States,* 1 CIT 120, 124, 511 F. Supp. 805, 808 (1981). In *Corporacion Sublistatica,* this court stated that "a 'finished' ink classifiable under 474.26, TSUS, *necessarily* must contain a liquid component." 1 CIT at 124, 511 F.Supp. at 808 (emphasis added). The court's determination in *Corporacion Sublistatica,* that ink requires a liquid component, is precedential because it is integral to the court's holding and is not mere dicta. *See, e.g., Donovan* v. *Red Star Marine Services, Inc.,* 739 F.2d 774, 782 (2d Cir. 1984).

The court, in *Corporacion Sublistatica,* in noting the legislative history of the term "ink," cited the 1960 *Tariff Classification Study,* prepared by the United States Tariff Commission. *See* 1 CIT at 125, 511 F. Supp. at 808. It is well established in customs law that in order to resolve questions relating to the meaning and scope of terms which appear in the tariff schedules, and to ascertain legislative intent, reference may be made to the 1960 *Tariff Classification Study. See Rifkin Textiles Corp.* v. *United States,* 54 CCPA 138, 140–41, C.A.D. 925, *cert. denied,* 389 U.S. 931 (1967). The *Tariff Classification Study,* Schedule 4, Part 9, at 151, states that "[i]nks * * * are related to paints in that they contain a coloring agent and a liquid vehicle." Hence, the court must agree with the view express in *Corporacion Sublistatica,* that it was the intention of Congress that ink, under the tariff schedules, must contain a liquid component. *See* 1 CIT at 124, 511 F. Supp. at 808.

Plaintiff attempts to distinguish *Corporacion Sublistatica* by suggesting that, in determining the proper classification of a gravure ink in powder (solid) form, the court was limiting its decision to

"unfinished" inks. The distinction, however, is unpersuasive in light of the court's unequivocal statement that merchandise lacking a liquid component was not a "finished ink." *See id.*

In support of its primary contention that the imported merchandise in issue should have been classified as ink, under item 474.26, TSUS, plaintiff invokes the principle that tariff statutes are written in the language of commerce, which is presumed to be the same as its common meaning. *See Nylos Trading Co.* v. *United States*, 37 CCPA 71, 73, C.A.D. 422 (1949). This principle, however, is not dispositive because the focus is not simply whether toners have been referred to as "inks," but whether the industry refers to them as "inks" because they are viewed substantively as inks. In this instance, as the defendant has shown, the word "ink" when used in commerce to refer to toners, is used essentially for marketing purposes, to enable laymen to understand the general concept behind the use of toner.

Defendant's witness, Mr. John Walkonis, Assistant Director of Research for Olin Hunt Special Products, Inc., and a chemist with 24 years of experience, testified that he had never heard the dry toners and developers referred to technically as inks. Mr. Walkonis, who was involved in the development and marketing of toners by his company, added that, although his company has marketed some of its toners as inks, he attributed the designation to marketing strategy rather than technical accuracy.

Although plaintiff points to a variety of uses for the term ink, from sales catalogs to publications of the United States International Trade Commission, it produced no evidence to suggest that the terminology was used in an accurate or technical sense rather than as a marketing device. Furthermore, although catalog references may be helpful and may offer guidance, they are not dispositive. *See United States* v. *Sheep Shearers Mdse. & Comm. Co.*, 23 CCPA 146, 150, T.D. 48009 (1935).

The defendant emphasizes the authority of the *Corporacion Sublistatica* case to support its contention that toners and developers are not inks within the meaning of the tariff schedules because they do not contain a liquid component. The defendant, however, also brought the following factors to the attention of the court: that labels and promotional materials referring to toner as "dry inks" were for marketing, not technical purposes; that the references made in recent publications of the United States International Trade Commission, because of different factual situations, were not pertinent; and that lexicographic materials cited by plaintiff did not encompass powdered ink which did not in any way contain a liquid component. In addition, the defendant stressed that xerography has been described as an "inkless" process. *See* Reifer, *Dictionary of New Words* 231 (1955).

After a thorough consideration of the question, the court has concluded that references to toner in commercial parlance as dry ink

are for marketing purposes to assist lay persons to understand the use of the merchandise. The court has also concluded that the legislature intended "ink," for tariff purposes, to include a liquid vehicle, and therefore, it becomes unnecessary to pursue plaintiff's further contentions as to the classification of toner as ink.

The plaintiff offers an alternative classification for the imported developers, which consist of a mixture of ink and iron powder. Because developer is a mixture of iron powder (90%) and toner (10%), plaintiff contends that it is described by the chemical mixture provisions, items 432.20 (1980) and 432.25 (1981), TSUS, with duty rates, respectively, of 4.8 per centum and 4.7 per centum.

Plaintiff's alternative classification, however, is unavailing in light of invasionary headnote 1 of Part 2 of Schedule 4, under which fall items 432.20 and 432.25. The headnote provides that "[t]his part covers chemicals, except those provided for elsewhere in this schedule and those specially provided for in any of the other schedules." The court agrees with the contention of the defendant that the toners and developers are properly classifiable as "[p]hotographic chemicals" under items 405.20 and 408.41, TSUS. In sum, the "[p]hotographic chemicals" classification amounts to an overriding provision within schedule 4 as contemplated by invasionary headnote 1.

The defendant contends that the imported merchandise is properly classifiable as "[p]hotographic chemicals." "Photographic chemicals," under TSUS items 405.20 (1980) and 408.41 (1981), is an *eo nomine* designation. It is basic in customs law that an *eo nomine* designation, in the absence of a demonstrated legislative intent to the contrary, includes all forms of the article. *See NEC America Inc.* v. *United States*, 8 CIT 184, 186, 596 F. Supp. 466, 468 (1984), *aff'd*, 760 F.2d 1295 (Fed. Cir. 1985). Hence, for the government's proposed classification to be correct, it must be demonstrated that the term "[p]hotographic chemicals" includes toners and developers used in the electrophotographic process. Although the legislative history does not offer specific guidance on this question, it is certain that the tariff schedules were enacted "not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment of the original provision." *Corporacion Sublistatica, S.A.* v. *United States*, 1 CIT 120, 126, 511 F. Supp. 805, 809 (1981).

The court must initially determine whether the process of electrophotography is encompassed by the term photography. In order to determine the common meaning of photography, the court may consult dictionaries, scientific authorities, case law, and other reliable sources. *See Schott Optical Glass, Inc.* v. *United States*, 82 Cust Ct. 11, 16, 468 F. Supp. 1318, 1321, *aff'd*, 67 CCPA 32, 612 F.2d 1283 (1979). In the *McGraw-Hill Dictionary of Scientific and Technical terms* 1206 (3d ed. 1984), photography is defined in sweeping lan-

guage as "[t]he process of forming visible images directly or indirectly by the action of light or other forms of radiation on sensitive surfaces." *Van Nostrand's Scientific Encyclopedia* 1766 (5th ed. 1976) defines photography as "[a] technology in which processes and techniques are used to produce images through the action of electromagnetic radiation. The term embraces all processes employing materials sensitive to visible light, or to other forms of radiant energy * * *." *Webster's Third New International Dictionary* 1702 (1981) defines photography as "an art or process of producing a negative or positive image directly or indirectly on a sensitized surface by the action of light or other forms of radiant energy."

Defendant contends that lexicographic sources and the testimony at trial establish that the electrophotographic process is a form of photography. *Van Nostrand's Scientific Encyclopedia* 1770 (5th ed. 1976) explains electrostatic photography (also called xerography and electrophotography) as follows:

> As in wet (silver halide) photography, the dry electrophotographic process forms a latent image by exposing a sensitive layer to light. This image is then made visible by a dry-process technique, in contrast to the usual (wet) processes of conventional photography. In general, for electrostatic photography, the sensitive layer is usually a photoconductor which is charged. On exposure, the latent image is formed as a pattern of charge, which is made visible during development by having finely divided powders attracted electrostatically to the charged areas of the latent image * * *. Such small particles, usually charged, are referred to as *toners*.

Webster's Third New International Dictionary 733 (1981) defines electrophotography as "photography in which images are produced by electrical means (as in xerography)." The same source provides the following definition of xerography:

> the formation of pictures or copies of graphic matter by the action of light on an electrically charged photoconductive insulating surface in which the latent image usu[ally] is developed with powders that adhere only the areas that remain electrically charged and in which the image formed by the powders sometimes is transferred to a sheet of paper.

Webster's Third New International Dictionary 2644 (1981).

At trial, defendant's expert witness, Mr. John Walkonis, testified that he agreed with the excerpt read to him from the *Encyclopedia of the Electrochemical Industry*. According to the excerpt read to the witness from page 1177, "xerography is a relatively new photographic process based on the physical phenomena of photoconductivity and electrostatics rather than on a photochemical reaction as other photographic processes." Mr. Walkonis testified that the processes of photography and electrophotography are similar in many ways, in that, both processes utilize light to form an image on

a surface, and in both cases the latent image must be developed and fixed on another surface.

The expert testimony of Mr. Walkonis, supports the lexicographic authorities which state that the electrophotographic process utilizes a photographic procedure. As defendant notes, the definitions of photography "clearly embrace all processes involving the formation of images by the action of radiant energy on sensitive surfaces."

Although expert testimony as to the common meaning of a tariff term is merely advisory, it is nevertheless probative when, as in this case, it is supported by lexicographic and other technical sources. *See NEC America, Inc.* v. *United States,* 8 CIT 184, 190, 596 F. Supp. 466, 471 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985). Although all of the expert testimony was helpful, the court found the testimony of Mr. Walkonis, the defendant's expert, both instructive and persuasive. *See A & A International Inc.* v. *United States,* 11 CIT ——, Slip Op. 87–117, at 18 (Oct. 29, 1987). Drawing on his academic training, as well as his 24 years as a chemist, Mr. Walkonis testified that "electrophotography is a photographic process in many ways," the most basic of which is "the formation of a latent image on a substrate." This testimony is well supported by lexicographic sources.

Plaintiff contends that, although the electrophotographic process utilizes a photographic procedure, the process is essentially electrical, and, "[u]nlike photography, there are no chemical reactions involved * * * and the process is not based on silver." Hence, plaintiff argues that the lack of chemical reaction in the process negates the "photographic chemicals" designation. It is acknowledged that the traditional photographic process involves the use of chemicals to expose changes in silver halide made by light. *See McGraw-Hill Encyclopedia of Science and Technology* 200 (5th ed. 1982). As previously described, the process of electrophotography utilizes electrostatics or electricity in forming latent images on a substrate, rather than a chemical solution. The image is then developed by using toner.

The fact that electrophotography involves the use of electrostatic properties rather than chemical reactions does not preclude it from being a photographic process. Furthermore, the tariff schedules do not require that materials create a chemical reaction to be classified as "[p]hotographic chemicals." Toner and developer are clearly chemicals, and plaintiff has conceded this point by arguing that developer, which contains toner as an active ingredient, is alternatively classifiable under item 432.20 or 432.25, TSUS, as chemical mixtures not specially provided for. It is clear therefore, that toner and developer are chemicals utilized in a photographic process. Since toner and developer are chemicals used in a photographic process, the court has concluded that the defendant's proposed classification of the merchandise as "[p]hotographic chemicals" under items 405.20 (1980) and 408.41 (1981), TSUS, is correct.

Defendant contends that the toner and developer are alternatively classifiable as colors, dyes and stains, under TSUS item 406.50 (1980) and 410.22 (1981), with the exception of those designated CHT–1, CP–7 and APECO M620, because the products contain a solvent dye. According to defendant's second witness, Mr. Thomas Governo, a United States Customs Service chemist for 15 years, plaintiff's confidential lsit of chemicals revealed that the merchandise contained black solvent dyes. Mr. Governo also testified that the toners and developers that he analyzed previously for the Customs Service, are essentially the same as the merchandise at issue in this case.

Mr. Governo defined a dye or stain as "a material that is used to impart color to another substance." Although arguably, the toner and developer do accomplish this function, the items are more than just dyes or colors, and, therefore, can not properly be classified under that heading. As previously described, an important function of the imported merchandise is to develop the latent image which is formed on the charged substrate, by the attraction of the toner and developer particles to the substrate. It is clear that the imported merchandise is of a particular kind and is prepared for the particular process of electrophotography. Hence, "[p]hotographic chemicals" is a designation which more specifically describes the merchandise than "[c]olors, dyes and stains * * * [o]ther." *See John J. Coates Co.* v. *United States,* 44 CCPA 97, 102 (1957). When an article is described by more than one item, it is to be classified under the provision which describes it most specifically. *See General Interpretative Rule 10(c), TSUS; see, e.g., Aceto Chemical Co.* v. *United States,* 59 CCPA 212, 220–21, 465 F.2d 908, 914 (1972). Consequently, the court cannot agree with the defendant's other alternative classifications.

After a careful consideration of the testimony of the witnesses, lexicographic definitions, relevant case law, and all other pertinent sources, the court holds that the imported toners and developers are properly classifiable as "[p]hotographic chemicals" under item 405.20, TSUS, for the merchandise imported in 1980, and item 408.41, TSUS, for the merchandise imported in 1981. It is therefore ordered that the entries be reliquidated, and that the plaintiff pay the defendant the amount of duty required under items 405.20 and 408.41, TSUS.

(Slip Op. 88–18)

UNITED STATES OF AMERICA, PLAINTIFF *v.* LUN MAY CO., INC., AND AMERICAN MOTORISTS INSURANCE CO., DEFENDANTS

AMERICAN MOTORISTS INSURANCE CO., THIRD PARTY PLAINTIFF *v.* MAY M. LAM, A/K/A/ HOMAY LAM, THIRD PARTY DEFENDANT

Court No. 88–04–00433

Before DICARLO, *Judge.*

[Plaintiff's motion for summary judgment is granted; defendants' cross-motions for summary judgment are denied.]

(Decided February 11, 1988)

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Nancy E. Reich* and *Kenneth N. Wolf*) for plaintiff.

Soller, Singer & Horn (William C. Shayne) for defendant, Lun May Co., Inc.

Russotti & Barrison (Harvey Barrison) for defendant and third-party plaintiff, American Motorists Insurance Company.

Marshall Beil for third-party defendant, May M. Lam.

DICARLO, *Judge*: The United States brings this action pursuant to 28 U.S.C. § 1582(2) (1982) against an importer, Lun May Co., Inc. (Lun May) and its surety, American Motorists Insurance Co. (American Motorists), to recover unpaid liquidated damages relating to the importation of merchandise under an immediate delivery and consumption entry bond. The government moves and each defendant cross-moves for summary judgment. The government's summary judgment motion is granted and defendants' cross-motions are denied.

BACKGROUND

The following facts are undisputed. Lun May as principal and American Motorists as surety executed an immediate delivery and consumption entry bond. On six occasions after execution of this bond, foodstuffs were entered under the bond and released to Lun May. The Food and Drug Administration (FDA) took samples from selected shipments of the foodstuffs under the authority of section 801(a) of the Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. § 381(a) (1982). The FDA sent notices of detention and hearing to Lun May, stating the merchandise described therein from the sampled shipments violated section 801(a)(3) of the FDCA and giving Lun May 10 days in which to present oral or written testimony concerning the violation. The notices indicated some sampled merchandise appeared to be adulterated and other samples appeared to be decomposed.

Lun May did not present any testimony, and subsequently the United States Customs Service (Customs) forwarded to Lun May FDA notices of refusal of admission, which required that the merchandise be exported under the supervision of Customs within 90

days. Lun May did not export the merchandise under Customs supervision. Customs issued notices of liquidated damages totalling $50,589.00 and a demand for payment to both defendants. To date neither defendant has paid any part of the liquidated damages, despite additional demands by Customs.

DISCUSSION

The government asserts the defendants are liable for liquidated damages under paragraph 7 of the bond which, among others, provides for liquidated damages when merchandise found not to comply with the law and regulations governing its admission into the commerce of the United States is not exported after proper notice. The defendants raise several arguments.

(1)

American Motorists asserts the government is seeking liquidated damages for Lun May's failure to export entire shipments of allegedly tainted merchandise pursuant to notices of refusal of admission. According to American Motorists, the language of the bond and Customs regulations incorporated by reference allow for liquidated damages for entire shipments only pursuant to paragraph 4, and plaintiff is precluded from seeking judgment under paragraph 4 since Customs did not demand redelivery, which is a condition precedent to enforcement of that paragraph.

In *United States* v. *American Motorists Ins. Co.*, 11 CIT ——, Slip Op. 87–141 (Dec. 23, 1987), the court, confronted with bonds having language identical to that of the bond in this action, examined whether suit is possible only under paragraph 4 and not paragraph 7 if all of the merchandise at issue is tainted. Citing *United States* v. *Toshoku Am., Inc.*, 11 CIT ——, 670 F. Supp. 1006, 1010 (1987), *aff'd on rehearing*, No. 84–11–01590 (CIT Dec. 1, 1987), *appeal docketed*, Nos. 88–1221 and 88–1222 (Fed. Cir. January 28 & 29, 1987), and *United States* v. *India Food and Gourmet*, 9 CIT 171, 176 (1985), the *American Motorists* court concluded that paragraph 7 is not limited to only partially adulterated shipments. Slip Op. 87–141, at 6. Thus even if certain merchandise denied admission in the present action constituted an entire shipment, suit under paragraph 7 of the bond would not be precluded.

(2)

Lun May acknowledges receipt of the notices of refusal to admit but argues that under 19 C.F.R. § 141.113(g) (1985) Customs may only assess liquidated damages under a bond after making a demand for redelivery as set out in 19 C.F.R. § 141.113(b) (1985). Asserting that each entry covered in this action has been liquidated, Lun May claims plaintiff has lost the opportunity to recover under the bond since, pursuant to 19 C.F.R. § 141.113(f) (1985), Customs may not make a demand for redelivery after liquidation.

The defendants in *Toshoku* raised the same argument and the court rejected it. The *Toshoku* court reasoned that the demand for redelivery is used when Customs itself determines that goods should be excluded, but that the decision to exclude contaminated food is solely within the discretion of the FDA and Customs merely enforces the FDA decision. The court found that a demand for redelivery is not a prerequisite to direct exportation in cases where the FDA determines food should be excluded. The court concluded that liquidated damages could be assessed under paragraph 7 where the FDA notice of refusal instructed the principal to export the goods within 90 days, in order to comply with the laws governing its admission, and the principal does not export the merchandise within that time period. Citing *United States* v. *Utex Int'l Inc.*, 11 CIT ——, 659 F. Supp. 250, 253 (1987), *appeal docketed*, No. 87–1414 (Fed. Cir. June 17, 1987), the *Toshoku* court went on to hold that liquidation was not a bar to recovery under the bond in such situations where Customs is enforcing other agencies; orders designed to prohibit adulterated or decomposed matter from entering into the commerce of the United States. *Toshoku*, 11 CIT at ——, 670 F. Supp. at 1011; *see also American Motorists*, 11 CIT at ——, Slip Op. 87–141, at 7.

The Court accepts the reasoning of the *Toshoku* court and rejects Lun May's argument.

(3)

Lun May also contends that it never defaulted on its obligations under paragraph 7 of the bond, claiming that the notices of refusal to admit do not include a proper finding that the merchandise was adulterated, decomposed or otherwise in violation of the laws and regulations governing its admission into the commerce of the United States.

Lun May essentially alleges as a defense the failure of the government to establish the underlying violation. In *United States* v. *Imperial Food Imports*, 11 CIT ——, —— 660 F. Supp. 958, 960, *aff'd*, 834 F.2d 1013 (Fed. Cir. 1987), the court held that the FDA's finding that imported merchandise appeared to be adulterated under the FDCA is not the subject of an action under 28 U.S.C. § 1582(2). The court reasoned that the government had offered sufficient proof to obligate a surety on the bonds to pay the amount of liquidated damages assessed for noncompliance with notices of redelivery "[s]ince the imported merchandise was refused admission by the FDA, the merchandise was not exported, destroyed or redelivered and liquidated damages were not paid." *Imperial Food*, 11 CIT at ——, 660 F. Supp. at 960.

The present action differs from *Imperial Food* in that the principal rather than the surety is alleging this defense and the liquidated damages were assessed under paragraph 7 for failure to export under Customs supervision as directed by notices of refusal to admit rather than under paragraph 4 for failure to comply with notices of

redelivery. These differences, however, do not undermine the holding of *Imperial Food* that the FDA finding may not be challenged in an action under 28 U.S.C. § 1582(2). Similar to that case, the Court finds the government has offered sufficient proof in this action to obligate a principal on the bond to pay the amount of liquidated damages assessed under paragraph 7 where the imported merchandise was refused admission by the FDA, the merchandise was not exported under Customs supervision as directed by the refusals to admit, and liquidated damages were not paid as demanded by Customs. If Lun May wished to challenge the FDA's determination to refuse admission it could have presented oral or written testimony within the 10 days provided by the notices of detention and hearing, or as the government suggests, Lun May could have petitioned for relief from the liquidated damage assessment as provided for in part 172 of 19 C.F.R.

(4)

The Court finds summary judgment in the government's favor in the amount of $50,000.00, the amount guaranteed by the bond and requested by the government. The Court allows post-judgment interest in accordance with 28 U.S.C. § 1961 (1982). The question remaining is whether prejudgment interest should be awarded and, if so, from what date.

American Motorists contends the amount of liquidated damages assessed is punitive rather than compensatory and that prejudgment interest may not be awarded on punitive damages. Our appellate court in *Imperial Food* held that reasonable liquidated damages resulting from failure to heed FDA notices of refusal to admit and resulting Customs redelivery notices are not penalties. 834 F.2d at 1016, *see also American Motorists*, Slip Op. 87–141, at 8–9. The court found the amount of liquidated damages in that case reasonable because the amount assessed represented the value of the merchandise plus estimated duties, after the importer failed to destroy or export the merchandise refused admission. Similarly, the Court finds the amount of liquidated damages in this case reasonable since it is based on the entered value of only that merchandise denied admission, which Lun May did not export pursuant to Customs supervision as directed.

Our appellate court in *Imperial Food* also recognized that the decision whether to award prejudgment interest in situations such as this is within the trial court's discretion. American Motorists asserts that the Court should not award prejudgment interest in this action because the government delayed a long time in bringing its suit.

In *Imperial Food*, the trial court's award of prejudgment interest from the date of final demand was found not to be an abuse of discretion, even though the government had delayed one year from the date of final demand to bring its suit. The government seeks pre-

judgment interest in this action from the date of the last of the six separate demands for payment of liquidated damages, but did not bring its suit to secure such payment until almost 5 years after such date. In light of the exceptionally long time the government delayed in bringing this suit and the lack of clear precedent during that time governing the issues raised herein by defendants, the Court awards prejudgment interest from the date the suit was finally brought, April 4, 1986. *See American Motorists,* Slip Op. 87–141, at 9–10. The rate specified in 26 U.S.C. § 6621 (1982) shall apply.

CONCLUSION

Upon reading the pleadings, affidavits and exhibits, and the plaintiff's statement pursuant to Rule 56(i) and the defendants' responses thereto, the Court holds that the government is entitled to judgment as a matter of law, with pre- and post-judgment interest. The government's motion for summary judgment is granted and each defendants' cross-motion for summary judgment is denied. No determination is made as to the cross-claims or counterclaims in this action.

Judgment will be entered accordingly. So ORDERED.

(Slip Op. 88–19)

UNITED STATES, PLAINTIFF *v.* KINGSHEAD CORP., DEFENDANT

Court No. 82–8–01145

Before RAO, *Judge.*

(Motion to compel defendant to produce documents for inspection granted in part and denied in part)

(Dated February 12, 1988)

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division (*Elizabeth C. Seastrum*) and *Margaret Solinger,* Assistant Regional Counsel, U.S. Customs Service, for plaintiff.

Shaw, Goldman, Licitera, Levin & Weinberg (*Robert Goldman*) for defendant.

RAO, *Judge:* This civil action is before the Court on plaintiff's motion for an order compelling discovery and defendant's opposition thereto. On May 5, 1987 plaintiff served on defendant a second request for production of documents, specifically asking for:

> 1. All documents discussing, referencing, memorializing or pertaining in any manner to the Consent Judgment dated January 25, 1979, and signed by Judge Biunno of the United States District Court for the District of New Jersey, in the case of *United States of America* v. *$10,500.00 and A*

Letter of Credit In The Amount of $15,472.00, Civil Action No. 78–672.

Defendant objected to the production of these documents on the grounds that the request is vague and overly broad and that it seeks documents that are protected by the attorney-client privilege. Plaintiff claims that the defendant has waived the attorney-client privilege by asserting the affirmative defense that the civil penalties sought to be recovered in this civil action were the subject of the settlement agreement in the District Court case, *supra*. Defendant's attorney also claims that he has removed his offices to a new location and has not had an opportunity to unpack the files containing the documents being sought.

It is the opinion of the Court that the request for production of documents is not vague and overly broad, as it is limited to those documents in defendant's possession which relate to the consent judgment and a search for the pertinent files should not prove onerous or burdensome. Even though defendant's attorney has moved his office, it is now more than nine months since the request was made, and it is hoped that by the date of this order, defendant's attorney will be able to comply with the discovery request and produce any of defendant's documents in his possession which pertain to the settlement agreement.

The Court is not convinced that the attorney-client privilege has been waived by the affirmative defense of prior settlement of plaintiff's claim by an earlier consent judgment and would entertain a motion for a protective order as to those documents defendant would claim to be privileged. As to all other documents, however, the Court finds them to be discoverable under Rule 34 of this Court.

Our appeals court has discussed the various tests to be applied where privileges are asserted (particularly when the claim for a privilege is made by the plaintiff, not the case here) in *Zenith Radio Corp.* v. *United States*, 3 Fed. Cir. (T) 169, 764 F.2d 848 (1985). It discussed also the requirement that the party seeking the information make a strong showing of need in order to breach the privilege. *Zenith, supra* at 172. See also *Hambro Automotive Corp.* v. *United States*, 73 Cust. Ct. 236, 381 F.Supp. 1403, C.R.D. 74–11, in which this Court, speaking through Judge Watson, determined that there is a requirement that a showing must be made "that the privilege is being asserted pursuant to the will of the party for whose protection it exists and concerning specifically identifiable material and not in a merely tactical or reflexive manner by counsel."

Therefore, upon reading and filing plaintiff's motion to compel, upon defendant's opposition thereto, and upon all other papers and proceedings herein, it is hereby

ORDERED that plaintiff's motion to compel is granted in part and defendant is ordered to produce for inspection by plaintiff within 30 days from the date of this order all documents for which is does not specifically claim an attorney-client privilege. As to those *specific*

documents for which it does claim a privilege, defendant should move for a protective order, which plaintiff can oppose by showing the necessity of their production.

(Slip Op. 88–20)

FABRICAS EL CARMEN, S.A., DE C.V., ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–04–00558

[Judgment for defendant; order of remand vacated.]

(Dated February 17, 1988)

Green and Hillman, (Richard G. Green) and *Ben L. Irvin* for all plaintiffs other than Derivados Acrilicos.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(Jeanne E. Davidson),* Civil Division, United States Department of Justice, for defendant.

OPINION AND ORDER

RESTANI, *Judge:* Defendant moves to vacate the portion of this court's previous decision requiring remand. *Fabricas El Carmen, S.A., et al* v. *United States,* 12 CIT ——, 672 F. Supp. 1465 (1987). Defendant further moves to dismiss this action challenging the final affirmative countervailing duty determination of the United States Department of Commerce, International Trade Administration (ITA). *Certain Textile Mill Products from Mexico,* 50 Fed. Reg. 10,824 (Mar. 18, 1985). Defendant argues that the results of the first administrative review of this determination, *Certain Textile Mill Products from Mexico,* 52 Fed. Reg. 45,010 (Nov. 24, 1987), have rendered the remand moot.

FACTS

On October 7, 1987, this court denied certain challenges to ITA's final determination that a certain program bestowed countervailable benefits. 672 F. Supp. 1465. One of the arguments rejected by the court was plaintiffs' contention that losses due to Mexico's exchange rate system either negated any possible basis for finding that the program bestowed a subsidy, or resulted in net subsidy of zero. The remaining issues involved the methods ITA used to arrive at specific amounts of net subsidies, but it does not appear that other methods would have entirely eliminated any finding of net subsidy. Plaintiffs do not now argue that this is a possibility under the court's opinion. With regard to three of plaintiffs' methodology challenges, the court found ITA's determination neither based on substantial evidence nor in accordance with law. Accordingly, the

case was remanded to ITA for correction of errors. ITA was ordered to report its results in 45 days.

On November 20, 1987, prior to the time allowed for reporting the remand results, ITA filed the instant motion.

ARGUMENTS

Defendant argues that this court's remand order should be vacated, and this action dismissed, on the ground that "intervening circumstances [ITA's first administrative review of its final affirmative countervailing determination and order] have rendered the remand moot * * * [and that] unless vacated, the remand order would require this Court to issue an advisory opinion contrary to Article III of the Constitution." Defendant's Motion for Vacatur of Remand Order and to Dismiss at 1. Defendant explains that

> even if the amount of the subsidy in this case were revised upon remand, such a finding would have no practical effect because the adjusted subsidy could not be used for duty assessment or as the deposit rate on future entries. Thus, no entries—present or prospective—can be affected by any change that may result from recalculation of the original duty deposit rate upon remand.

Id. at 2–3. Defendant relies for support of its position, in part, upon the court's opinions in *PPG Industries, Inc.* v. *United States,* 11 CIT ——, 660 F. Supp. 965 (1987), *Alhambra Foundry* v. *United States,* 10 CIT ——, 635 F. Supp. 1475 (1986) and *Silver Reed America, Inc.* v. *United States,* 9 CIT 221, Slip Op. 85–51 (May 1, 1985).

Plaintiffs do not dispute the correctness of the court's prior opinions, but submit that this case is distinguishable in that in the final results of the administrative review ITA has ignored completely the court's instructions in remanding the underlying matter. In addition, plaintiffs argue that

> Since administrative reviews are almost routinely requested, if ITA's position is accepted by the Court, ITA is in a position to negate any order of this court for a remand simply by waiting until the last minute and then coming down with its final administrative review determination which blithely repeats all the errors the Court has instructed it to correct. ITA high-handedly tells the Court (page 6 of its memorandum) that plaintiffs may start all over again with a suit seeking judicial review of the final results of its administrative review. As if the Court calendars are not already sufficiently overloaded, ITA would require aggrieved parties to go through a chain of lawsuits to get a determination of an issue—and perhaps never get a determination because ITA evades the Court's direction by attempting to nullify it through publication of an administrative review—in this case, publication with an effective date after the due date of its response to the Court's remand.

Plaintiffs' Memorandum in Opposition at 3.

DISCUSSION

The court has found, on previous occasions, that the publication of the results of a 751[1] administrative review may in some cases warrant vacatur of this court's pending order of remand to ITA regarding the underlying final determination. *Alhambra Foundry* v. *United States*, 10 CIT ——, 635 F. Supp. 1475 (1986) (vacating a remand order in a review of a countervailing duty determination and *Silver Reed America, Inc.* v. *United States*, 9 CIT 221, Slip Op. 85–51 (May 1, 1985) (vacating a remand order in a review of an antidumping duty determination). *See PPG Industries, Inc.* v. *United States*, 11 CIT ——, 660 F. Supp. 965 (1987) (actions challenging countervailing duty investigation and determinations dismissed as moot). In *Alhambra*, the court previously had remanded a countervailing duty determination to ITA for further clarification and determination regarding certain issues bearing upon the calculation of certain benefits, but not for redetermination of whether such benefits constitute countervailable subsidies. The court relied upon *Silver Reed* in support of its holding that a remand would serve no purpose, because the results of the intervening 751 administrative review would serve as the basis for the actual assessment of duties on past entries covered by the review, and for cash deposits on future entries.

Although there are some factual distinctions to be drawn among the cases, the essential reasoning underlying the *Alhambra*, *Silver Reed* and *PPG Industries* decisions is applicable here. Central to this reasoning is an understanding of the limited scope of ITA's investigation phase, which may culminate in a final determination and order, and of this court's jurisdiction over the various separate determinations which take place over the life of a proceeding. *See* 19 C.F.R. §§ 353.11 & 355.6 (1987) (definitions of "investigation," "determination" and "proceeding") and 19 U.S.C. § 1516a(a)(2) (1982 & Supp. III 1985) (review of determinations on record).

Countervailing duty determinations and orders, which are part of the investigative phase of a countervailing duty proceeding, 19 C.F.R. § 355.6(b), provide for provisional measures such as the suspension of liquidation of merchandise entered after a preliminary determination and for the setting of rates for cash deposits of estimated duties in accordance with calculations of net subsidies set forth in ITA's preliminary and final determinations.[2] The actual assessment of countervailing duties, however, does not occur until after ITA's countervailing duty order has been published. Assess-

[1] The term "751 review" refers to the fact that section 751 of the Tariff Act of 1930, as amended, which is codified at 19 U.S.C. § 1675 (1982 & Supp. III 1985), provides for this review.

[2] Specifically, in an affirmative preliminary determination, ITA identifies subsidy programs, estimates net subsidies and orders the suspension of liquidation of the subject merchandise and the posting of deposits or bonds equal to ITA's estimated net subsidies. 19 U.S.C. § 1671b(b) & (d) (1982 & Supp. III 1985) and 19 C.F.R. § 355.28(a) & (d) (1987). In cases such as this, where an injury determination is not required, 19 U.S.C. § 1303 (1982), ITA combines its final affirmative determination with a countervailing duty order. 19 C.F.R. § 355.36 (1987). Countervailing duties are again estimated, suspension of liquidation is continued, the posting of deposits or bonds of such estimated duties are ordered pending liquidation of entries, 19 U.S.C. § 1671d(c)(4) & (d) (1982 & Supp. III 1985), 19 C.F.R. § 355.33(f) (1987) and provisions are made for the future assessment of countervailing duties. 19 U.S.C. 1671e(a) (1982 & Supp. III 1985), 19 C.F.R. § 355.36.

ments are then made on past entries on an annual basis, either as part of a 751 administrative review or, under current law, if a review is not specifically requested, at the instruction of ITA pursuant to its regulations providing for assessment at the cash deposit rate in effect at the time of entry. 19 U.S.C. § 1675(a) (1982 & Supp III 1985), 19 C.F.R. 355.10(d) (1987). *British Steel Corp.* v. *United States,* 11 CIT ——, 647 F. Supp. 928, 930–31 (1986) *appeal dismissed as moot and remanded for vacatur* No. 87–1050 (Fed. Cir. April 1, 1987), *vacated in part* 661 F. Supp. 68 (1987) (vacating denial of preliminary injunction). *See British Steel,* 11 CIT ——, 649 F. Supp. 78, 80–81 (1986).

A remand of an original countervailing duty determination which results in ITA's recalculation of the amount of net subsidies compels ITA to set new cash deposit rates for new entries, and if no review is ultimately requested for the period covering those entries, in ITA's assessment of duties on those entries at that same rate. 19 U.S.C. § 1675(a), 19 C.F.R. § 355.10(d), *British Steel,* 647 F. Supp. at 930–31. Once the final results of the 751 review are published, however, any recalculation of deposit rates by ITA in a remand of the original determination has no effect on new entries because applicable deposit rates are set by the 751 review. 19 U.S.C. § 1675(a)(1), 19 C.F.R. § 355.10(c)(8)–(9). *See PPG Industries,* 660 F. Supp. at 970, *Alhambra,* 635 F. Supp. at 1476, *Silver Reed,* 9 CIT at 224. The past entries covered by the 751 review period are no longer the subject of any deposit rates, but rather, are the subject of a completed final assessment determination made in that 751 review. *Id.* Thus, the remand does not affect them.[3] The remaining past entries, occurring after the 751 review period—December 31, 1985—but before the review's publication date—November 24, 1987—will be assessed in accordance with subsequent reviews, if requested, or at the cash deposit rate at the time of entry. 19 U.S.C. § 1675(a), 19 C.F.R. 355.10(d), *British Steel,* 647 F. Supp. at 930–31. Therefore, if no review is requested for such periods, it is possible that final assessments on these entries could be based upon ITA's calculation of net subsidies in the final determination under review in this case. As such assessments are based on the amounts deposited at the time of entry, however, recalculation upon remand in this case also would have no effect on this group of entries.[4]

Plaintiffs may not enlarge the scope of the existing action, involving a challenge to the final countervailing duty determination, to embrace challenges to ITA's subsequent 751 administrative reviews. *See Silver Reed,* 9 CIT at 224–25; *British Steel,* 647 F. Supp. at 930. Any 751 review must be challenged in a separate action, based upon

[3] In this case, the entries covered by the 751 review period—January 3, 1985, to December 31, 1985—will have countervailing duties assessed at the rate set forth in that review. Any differences between the amount of estimated deposits posted upon entry and the actual amount assessed is either collected or refunded. 19 U.S.C. § 1671f (1982).

[4] Plaintiff may of course obtain relief regarding this category of entries by filing a subsequent request for a 751 review. Moreover, no one has argued that prior to final assessment the court may order refunds of *deposits* already made or further collections to increase past deposit amounts. Such adjustments are made at the assessment stage, and appropriate interest is paid or collected at that time. 19 U.S.C. § 1671f, 19 C.F.R. § 355.40 (1987).

the particular administrative record before the agency at the time of that 751 review.

The situation with which plaintiffs find themselves presented in this case reflects the fact that they have challenged ITA's determination of the amount of net subsidies in the investigative stage of this countervailing duty proceeding.[5] At that stage, ITA's determination of the amount of net subsidies has limited significance and effect, which are superceded by ITA's subsequent determination of net subsidies in 751 administrative reviews. At the administrative review stage, however, ITA's net subsidy determinations have broader significance and effect which survive subsequent 751 reviews. If plaintiffs were to challenge the amount of net subsidies which ITA determines in a 751 administrative review, and if their challenge resulted in a remand for correction of legal and factual errors, ITA could neither negate that remand order, nor avoid an ultimate resolution of plaintiffs' challenge to the amount of net subsidies. While an intervening publication of a subsequent 751 review might limit the full effect of ITA's previous net subsidy determination (by basing future cash deposit rates upon the more recent 751 review) it would not eliminate its effect altogether. Entries covered by the period of that challenged 751 review would ultimately be liquidated in accordance with the court's final decision, so long as such liquidation were enjoined by the court (as it is in virtually all 751 cases). 19 U.S.C. § 1516a(c) & (e) (1982 & Supp. III 1985); *Zenith Radio Corp.* v. *United States*, 710 F.2d 806 (1983).

Accordingly, the court hereby vacates that portion of its decision of October 7, 1987, which remands this matter to ITA.

SO ORDERED.

(Slip Op. 88–21)

JAY-ARR SLIMWEAR INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 85–01–00003

Before TSOUCALAS, *Judge*.

Plaintiff challenges that portion of the appraisement which includes the payment of commissions and consular fees in the dutiable value of the merchandise; and further contests Customs' classification of the goods as ornamented.

Held: The commissions were not paid for services rendered by a *bona fide* buying agent but were costs related to the production of the goods. Further, the payment of consular fees assessed at or before the point of sale are dutiable. The imported merchandise consisting of brassieres with a lace edging are properly classifiable as no-

[5] Aside from using a challenge to ITA's method of calculating net subsidies as a means of disputing the very countervailability of the program at issue, plaintiffs were also concerned with the immediate impact of posting cash deposits which were based, in part, upon ITA's acknowledged errors.

nornamental garments as the lace does not provide more than an incidentally decorative effect.

[Judgment in part for plaintiff; judgment in part for defendant.]

(Decided February 18, 1988)

Soller, Singer & Horn (Raymond F. Sullivan, Jr.) for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice *(Kenneth N. Wolf)* for defendant.

Memorandum Opinion and Order

Tsoucalas, *Judge:* This matter is before the Court, after trial, to determine whether certain payments representing commissions and consular fees were properly considered dutiable in the appraisement of the imported merchandise; and whether the imported merchandise consisting of brassieres with a lace edging, were properly classified as ornamented garments.

Background

At trail plaintiff produced two witnesses, the first of whom was Mr. Jack Rosenbaum, the president of Jay-Arr Slimwear. According to his testimony, plaintiff shipped precut fabric and accessories to Caribbean Contractors in Haiti to be assembled into the subject brassieres. Trial Transcript at 7–8 (hereinafter "Tr. at ——"). Plaintiff's other witness was Mr. Alain Turnier, the principal of Caribbean Contractors. Over fifteen years ago the two men established a business relationship, wherein Mr. Turnier's company would assemble plaintiff's goods. For each order shipped to Haiti, the two negotiated a price for assembly. Tr. at 8, 67.

In addition, Mr. Turnier agreed to act as plaintiff's representative in Haiti, for which he was compensated. As part of these special services rendered to plaintiff, Turnier secured enough quota for plaintiff's goods. Tr. at 13–15, 48. Turnier applied for quota (on behalf of Caribbean Contractors), which he distributed to his customers. Tr. at 76. Although Turnier did not have to pay for the quota directly, he had access to the quota allocation, Tr. at 15, 76, and was reimbursed for the "indirect" costs he incurred for this function. Tr. at 77. Turnier was also to expedite the release of plaintiff's goods from Haitian Customs and eliminate any interference in the import and re-export of plaintiff's goods from Haiti, such as minimizing the amount of time the plant was closed for a "work off";[1] controlling stealing; and arranging for pick up of the merchandise upon importation. Tr. at 15, 48, 78. Mr. Turnier achieved these results by "speaking with the right people" in Haiti. The two witnesses testified that as a result of Mr. Turnier's previous experience as a commercial counsel at the Haitian Embassy in Washington, as Commerce and Finance Minister in Haiti, and as a well known business man in Haiti, he was able to exert influence in order to ease the way for the assembly of plaintiff's goods. Tr. at 11–13, 48–50, 66.

[1] Apparently, in Haiti the government could close down a plant based solely upon a labor complaint. Tr. at 13, 78.

Mr. Turnier was not given explicit instructions by plaintiff, but was advised of any problem and obtained the assistance of people in Haiti to avoid delays in the production of plaintiff's goods. Tr. at 49, 51.

The amounts to be paid Turnier were negotiated between he and Mr. Rosenbaum on a style by style basis, but equalled approximately one-third the cost of assembly. Tr. at 12, 20–21, 75. Plaintiff generated pro forma invoices representing these commissions; apparently separate from those invoices reflecting the transactions for the assembly, Tr. at 16–18, 20; and plaintiff issued checks to Mr. Turnier distinct from those issued to Caribbean Contractors. Tr. at 52–53. However, Turnier endorsed some of these payments over to Caribbean Contractors. *See* Plaintiff's Exhibits 2 and 3; Defendant's Exhibit A. Turnier explained that these were loans to his company to meet expenses. Tr. at 94.

As to the payment of consular fees, the Haitian government assesses this charge on goods entered for assembly, based on the value of the materials. The payment of these fees is a precondition to the release of the goods. Tr. at 101. Mr. Rosenbaum stated that plaintiff did not pay the consular fees, rather Caribbean Contractors made the payments, and would be reimbursed by plaintiff upon receipt of the invoices and consular receipts. Tr. at 42–44. However, there were instances where these charges were paid directly by plaintiff, Tr. at 100, and Mr. Turnier was of the opinion that payment was ultimately plaintiff's responsibility. Tr. 55–57, 80.

Finally, there was evidence adduced pertaining to one style of the imported brassieres, which was considered by Customs to be ornamented. This garment, represented by Plaintiff's Exhibit 7, has a strip of tiny scalloped lace, approximately three-eighths of an inch wide, trimming the top of the cup to cover the raw edge of rubber. Less than one-eighth of an inch of lace extends out from the edge of the cup. Some material was necessary to cover that edge and it was the designer's choice to use this fabric. Tr. at 24–25. Mr. Rosenbaum testified that the marketability of this style was not affected by the lace. Tr. at 26–28. Although of the opinion that in the industry, the lace would not be considered to have a decorative effect, Mr. Rosebaum stated that the scalloping did serve a decorative purpose. Tr. at 28–29, 58.

DISCUSSION

The merchandise was appraised on the basis of transaction value under § 402 of the Tariff Act of 1930, as amended (19 U.S.C § 1401a (1982)). 19 U.S.C. § 1401a(b) provides:

> (1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to—
>
> (A) the packing costs incurred by the buyer with respect to the imported merchandise;

(B) any selling commission incurred by the buyer with respect to the imported merchandise;
(C) the value, apportioned as appropriate, of any assist;
(D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
(E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

* * * * * * *

(4) (A) the term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

The amounts enumerated in subsection (b)(1) will be added to the price actually paid or payable only to the extent not already included in that price, and only if based on sufficient information. 19 U.S.C. § 1401a(b)(1).

The first issue is the dutiability of Turnier's commission. Plaintiff claims that the activities of Turnier, in exerting his influence on plaintiff's behalf in Haiti, are distinguishable from the mere assembly activities of Caribbean Contractors, Turnier's company. Defendant argues that Turnier and Caribbean Contractors are one and the same and the commissions are in fact part of the cost of the merchandise.

The nature of the services performed by the agent giving rise to the commission determines whether that cost should be included in the market value of the merchandise. A *bona fide* buying commission is exempt from dutiable value. *Rosenthal-Netter, Inc.* v. *United States*, 12 CIT ——, ——, Slip. Op. 88–9 at 4 (January 28, 1988) (citing *United States* v. *Nelson Bead Co.*, 42 CCPA 175, 183, C.A.D. 590 (1955); *J.C. Penney Purchasing Corp. et al.* v. *United States*, 80 Cust. Ct. 84, 95, C.D. 4741, 451 F. Supp. 973, 982 (1978)). In comparison, selling commissions are included within the dutiable value. 19 U.S.C. § 1401a(b)(1)(B); *Dorf Int'l, Inc., et al.* v. *United States*, 61 Cust. Ct. 604, 611, A.R.D. 245, 291 F. Supp. 690, 695 (1968). The distinction is whether the expense is associated with selling or producing the merchandise, rather than some ministerial function in procuring the goods. *See Norco Sales Co.* v. *United States*, 65 Cust. Ct. 778, 782, R.D. 11732 (1970).

In assessing whether Turnier's commission should be included in the appraised value of the merchandise, the initial inquiry must focus on whether this fee was a *bona fide* buying commission. Plaintiff bears the burden of proof in establishing that this relationship

was a *bona fide* buying agency and must demonstrate the non-dutiable nature of the commission. *B & W Wholesale Co.* v. *United States,* 58 CCPA 92, 97, C.A.D. 1010, 436 F.2d 1399, 1403 (1971); *Rosenthal-Netter,* 12 CIT at ——, Slip. Op. 88–9 at 4; *New Trends Inc.* v. *United States,* 10 CIT ——, ——, 645 F. Supp. at 957, 960 (1986).

Examples of services which are characteristic of those rendered by a *bona fide* agent include: compiling market information, gathering samples, translating, placing orders based on the buyer's instructions, procuring the merchandise, assisting in factory negotiation, inspecting and packing the goods, and arranging for shipment and payment. *Bushnell Int'l, Inc.* v. *United States,* 60 CCPA 157, C.A.D. 1104, 477 F. 2d 1402 (1973); *United States* v. *Nelson Bead Co.,* 42 CCPA 175, C.A.D. 590 (1955); *J.C. Penney Purchasing Corp. et al.* v. *United States,* 80 Cust. Ct. 84, C.D. 4741, 451 F. Supp 973 (1978); *United States* v. *Knit Wits (Wiley) et al.,* 62 Cust. Ct. 1008, A.R.D. 251 (1969); *Carolina Mfg. Co.* v. *United States,* 62 Cust. Ct. 850, R.D. 11640 (1969).

Regardless of how the parties characterize the relationship, whether a *bona fide* agency exists is to be determined by examining the actual transaction. *Shalom Baby Wear, Inc.,* v. *United States,* 62 Cust. Ct. 856, 864, R.D. 11641 (1969). Since the agent must represent the buyer only, *Nelson Bead,* 42 CCPA at 176, the agent's relationship with the seller or manufacturer is a critical factor to consider in determining whether a buying agency exists. Defendant contends that there has been no proof that Caribbean Contractors has a corporate existence, or is a separate entity from Turnier. The legitimacy of an agency relationship "may well be questioned when the so-called commissionaire and the manufacturer are under common control of members of the same family * * *. [C]ommon control exists where separate legal entities are in fact controlled by the same person or members of the same family." *Fine Arts Bag Co.* v. *United States,* 57 Cust. Ct. 625, 633, R.D. 11224 (1966) (citations omitted).

Turnier's ownership of Caribbean Contractors does not *per se* disqualify him as an actual buying agent. *See id.* at 636. However, there must be proof of his financial detachment from Caribbean Contractors, the manufacturer, in reference to the commissions paid. *New Trends,* 10 CIT at ——, 645 F. Supp. at 962; *Fine Arts Bag,* 57 Cust. Ct. at 636. If any of the commissions were retained directly or indirectly by the seller, then the *bona fides* of a buying agency are suspect. *Nelson Bead,* 42 CCPA at 176; *see also Park Avenue Imports* v. *United States,* 62 Cust. Ct. 1035, A.R.D. 255 (1969) (it is of no consequence that agent possesses a stock interest in manufacturing company provided parties are not in privity and no commissions inure to the manufacturer's benefit).

In this vein, the evidence does not conclusively prove that the commissions paid Turnier do not inure to the benefit of Caribbean Contractors. Defendant's Exhibit A illustrates that seven out of

eighteen checks payable to Turnier were endorsed over to Caribbean Contractors. While Mr. Turnier explained that these were loans to his company, it has not been demonstrated that these payments are not disguised amounts paid for the merchandise. Nevertheless, profits earned by an agent which may ultimately benefit the manufacturer is but one factor, which standing alone, does not bar exclusion of the commissions from the dutiable cost. *Bushnell,* 60 CCPA at 161, 477 F.2d at 1406. No single factor is determinative; the relationship must be judged by the entire factual situation. *J.C. Penney,* 80 Cust. Ct. at 95, 451 F. Supp. at 983; *Knit Wits,* 62 Cust. Ct. at 1011.

A primary consideration, however, in ascertaining whether this relationship is that of principal-agent, rather than buyer-seller, "is the right of the principal to control the conduct of the agent with respect to the matters entrusted to him." *Dorf,* 61 Cust. Ct. at 610, 291 F. Supp. at 694. The degree of discretion granted the agent is an important factor. *New Trends,* 10 CIT at ——, 645 F. Supp. at 960. Where the buyer exercises no control over the manner in which the agent performs his duties, a *bona fide* buying agency cannot be established. *B & W Wholesale,* 58 CCPA at 95–96, 436 F.2d at 1402.

On this point, plaintiff's proof clearly fails, as Mr. Rosenbaum testified that plaintiff exerted no control over Turnier, and he considered Turnier independent. Tr. at 51. Mr. Turnier was not given explicit directives. Rather, Mr. Rosenbaum merely explained his problem to Mr. Turnier, who, while expected to follow instructions issued by Mr. Rosenbaum, Tr. at 99–100, essentially, exercised total discretion in deciding how to best eliminate impediments to the release and manufacture of plaintiff's goods. Tr. at 61, 100. Based on the aforementioned factors, Turnier cannot be considered a *bona fide* buying agent.

Notwithstanding this conclusion, the question remains whether the commissions may nevertheless be considered exempt from the dutiable value of the goods. Commissions representing services associated with the actual production of the merchandise are a component of selling price and thus, dutiable. *Norco Sales Co.* v. *United States,* 65 Cust. Ct. 778, R.D. 11732 (1970). In *Norco,* the buyer's agent as well as the assembler's employees coordinated the various submanufacturing processes and arranged for delivery straight to the factory for packaging and assembly. The costs incurred for these services, labeled "handling commissions", were reimbursed by the buyer. Nonetheless, the court held that these were not typical of services performed on behalf of a buyer in reference to purchasing goods. Rather, these supervisory functions were costs related to the manufacture and assembly of the goods. 65 Cust. Ct. at 782–83.

Similarly, inspection commissions were considered part of the dutiable value of the goods where the agent was to inspect all component pieces at each stage of production. *International Fashions* v. *United States,* 76 Cust. Ct. 92, C.D. 4640 (1976), *aff'd* 64 CCPA 35,

C.A.D. 1180, 545 F. 2d 138 (1976). The presence of this charge indicated that the goods were quality controlled and therefore, these expenses were incidental to placing the merchandise in condition, packed ready for shipment to the United States. The court distinguished this payment, which affects the *nature* of the foreign merchandise purchased for exportation, from a buying commission, which is associated with and affects the *manner* in which foreign merchandise is purchased for exportation. 76 Cust. Ct. at 96; *compare Concord Electronics Corp.* v. *United States,* 85 Cust. Ct. 87, C.D. 4877 (1980) (inspection services, which were not of a quality control type relating to production, did not affect the non-dutiable status of *bona fide* buying commissions). Additionally, *International Fashions* has been interpreted to "stand[ ] for the proposition that a fee which *must* be paid by the importer is part of dutiable value." *J.C. Penney,* 80 Cust. Ct. at 99, 451 F. Supp. at 986. In comparison, commissions are not an integral part of the price of the goods where the transaction could occur without the intervention of the agent and without paying the commission. *Id.* at 100, 451 F. Supp. at 986.

The Court must conclude that the commissions paid were properly included in the transaction value of the merchandise. The results obtained by Turnier could not occur but for his intervention. Plaintiff would not be able to deal with the Haitain Customs, expedite the delivery of the goods to the assembly plant, or curtail the effects of a "work off". Although Turnier's services are more closely associated with the manner, rather than the nature, in which the goods are produced for exportation, *see International Fashions, supra;* the capacity in which he functioned more nearly resembles the supervisory duties exercised in the *Norco* case. Further, it is bothersome that the commissions were negotiated on a style by style basis, in the same manner the assembly costs were negotiated. Tr. at 84. When asked to explain an instance where one commission was four times the amount of another commission, Mr. Turnier testified that he did not perform any different services on those occasions to warrant the disparity. Tr. at 86–87. Viewing the totality of the circumstances, plaintiff has failed to overcome its evidentiary hurdle.

As to the inclusion of consular fees in the appraised value of the merchandise, plaintiff asserts that it merely reimbursed Caribbean Contractors for payments made to the Haitian government for consular fees. Plaintiff reasons that since these changes were paid to the Haitian government and not retained by the manufacturer, they are not a component of the price paid or payable for the merchandise.[2] The thrust of the parties' arguments focus on which entity actually paid the fees, and which party was ultimately responsible for payment. However, neither party discusses the nature of consular fees, which the Court considers to be determinative of the dutiability of this cost.

[2] The Court does not find it necessary to address plaintiff's defensive argument that these fees do not constitute an assist, which pursuant to 19 U.S.C. § 1401a(b)(1)(C), would be included in the value of the goods.

Broadly categorized, consular fees are charges paid to the consul in the country where the transaction in question occurred, for processing and verifying invoices. *International Commercial Co., Inc., et al.* v. *United States,* 26 Cust. Ct. 607, 623, Reap. Dec. 7980 (1951), *aff'd,* 28 Cust. Ct. 629, Reap. Dec. 8112 (1952). When paid to secure consular invoices necessary for export, these exactions resemble export taxes. 26 Cust. Ct. at 626. Exactions such as export taxes, which are assessed on the goods at the time of exportation are not part of the dutiable value of the merchandise. *Sternfeld* v. *United States,* 12 Ct. Cust. App. 172, T.D. 40065 (1924). However, where the tax accrues prior to exportation and is imposed on all sales, this amount is included for appraisement purposes. *United States* v. *Passavant,* 169 U.S. 16 (1898); *Sternfeld,* 12 Ct. Cust. App. at 173, 175.

The point in time when the charge is imposed is the crucial factor, since the main consideration is whether this is a cost of placing the goods in condition ready for shipment, which is a proper component of dutiable value. *International Commercial,* 28 Cust. Ct. at 636. Therefore, if the charge is assessed before or at the point of sale of the merchandise and is a component of the sales transaction, the amount is a necessary part of the dutiable value. *Passavant, 169 U.S. at 22; Atlas Trading Co.* v. *United States,* 26 Cust. Ct. 652, 655, Reap. Dec. 7989 (1951). Yet, where the exaction is tied to the activity of exportation, and not of sale, the amount is excludable. *Sternfeld,* 12 Ct. Cust. App. at 173–74; *Atlas,* 26 Cust. Ct. at 655.

The government in Haiti apparently imposes this fee on all merchandise entering the country for assembly. It is of no consequence that the goods would ultimately be re-exported. *Passavant,* 169 U.S. 16 (tax imposed on all goods when sold in host country but remitted if goods exported constituted part of the market value of the goods); *Muser* v. *Magone,* 155 U.S. 240 (1894) (no distinction drawn on basis that the goods were manufactured in one place and processed in another before final exportation). The charge accrues when the components arrive in Haiti for assembly, and if not paid, the assembly process cannot commence. Thus, these fees are necessarily present at the point of sale and are to be included as part of the price paid or payable for the merchandise.

The final issue for resolution is the appropriate classification of style 5520 of the imported brassieres (Plaintiff's Exhibit 7). The merchandise was classified by Customs under item 376.24, TSUS:

> Corsets, girdles, brassieres, and similar body-supporting garments for women and girls; * * * all the foregoing of any materials:
>
> > Lace or net articles, whether or not ornamented, and other articles, ornamented ..... 32% ad val.

Plaintiff alleges that the appropriate classification is under item 376.28, TSUS:

> Corsets, girdles, brassieres, etc.

Other articles, not ornamented .....18% ad val.

Headnote 3 to Schedule 3, TSUS, sets forth the relevant criteria for ornamentation:

> 3. (a) the term "*ornamented*", * * * means fabrics and other articles of textile materials which are ornamented with—
>
> * * * * * * *
>
> (iii) lace, netting, braid, fringe, edging, tucking, or trimming, or textile fabric.

Gelmart Industries, Inc. v. *United States*, 11 CIT ——, 655 F. Supp. 482 (1987) addressed the question of whether brassieres are ornamented as a result of lace edging. As this Court held:

> The presence of lace per se does not constitute ornamentation. Rather, the application of a two step analysis set forth in *United States* v. *Endicott Johnson Corp.*, 67 CCPA 47, C.A.D. 1242, 617 F.2d 278 (1980), determines whether an article is ornamented for tariff purposes. The first question is: Does the addition of the feature impart no more than an incidental decorative effect? The second inquiry is whether the feature has a functionality which is primary to any ornamentive nature. An affirmative response to either results in a nonornamental classification, and resolution of the first inquiry may eliminate the necessity of the second. 67 CCPA at 50, 617 F.2d at 281.

Id. at ——, 655 F. Supp. at 485. "Ornamentation has been construed to embrace that which enhances, embellishes, decorates, or adorns." *Id.* (citing *Blairmoor Knitwear Corp.* v. *United States*, 60 Cust. Ct. 388, 395, C.D. 3396, 284 F. Supp. 315, 320 (1968)).

In *Gelmart*, stretch material comprised the substance of each brassiere and scalloped lace extended approximately one half, to one inch, from beyond the end of the stretch material, trimming the edge of each cup. In that instance, the presence of the lace provided a sharp contrast to the stretch material or nylon composing the remainder of the garment; and the scalloped lace embellished and adorned the brassieres by adding eye appeal. *Gelmart*, 11 CIT at ——, 655 F. Supp. at 485.

The garments here in issue contain lycra spandex and nylon backs, completely nylon cups, and edging, which is three-eighths of an inch wide and stitched to the upper edge of each cup. The majority of the trim overlaps the edge of the cup and is covered by two rows of stitches. The importer testified that some material was needed to cover the raw edge of the cup and this material was chosen by the designer.

"Congress [did not] intend that all * * * [features] be per se ornamental unless proved to have a function. If the importer, by a preponderance of the evidence, proves any ornamentive aspects to be incidental, added proof of functionality is not mandated." *United States* v. *Endicott Johnson Corp.*, 67 CCPA 47, 50, C.A.D. 1242, 617

F.2d 278, 281 (1980). The focus is on the article itself and whether the addition of the lace makes the brassieres an ornamented garment. *Gelmart*, 11 CIT at ——, 655 F. Supp. at 485. The presence of this lace on these garments does not add eye appeal to the brassiere. While the lace is noticeable, it is not patently distinctive from the remainder of the article. *Id.* at ——, 655 F. Supp. at 486; *see Brittania Sportswear* v. *United States*, 5 CIT 212, 214 (1983). The presence of the lace does not provide a sharp contrast to the remainder of the garment as was the case in *Gelmart*. To hold that this edging is more than incidentally decorative would nullify the proposition that the presence of lace per se does not constitute ornamentation. "The test for ornamentation is not whether the added fabric is necessary, * * * nor is it per se ornamentation because a simpler fabric might have been used." *Gelmart*, 11 CIT at ——, 655 F. Supp. at 486 (citation omitted).

CONCLUSION

Plaintiff has failed to establish that the commissions paid to Turnier, the owner of the plant which assembles plaintiff's goods, were non-dutiable. Turnier's activities are not consistent with those of a *bona fide* buying agent as he was not under the control of plaintiff and it is not clear that the payments did not benefit Caribbean Contractors. These commissions were part of the dutiable value of the merchandise, as Turnier's activities were an integral link in the production of plaintiff's goods. Furthermore, the consular fees which were assessed on goods entering Haiti for assembly were also properly included in the value of the goods, since this was an exaction imposed at or before the time of sale. Finally, as to classification of the imported merchandise, the addition of tiny scalloped edging to finish the cups of the brassieres does not make them ornamented garments. The presence of the lace is no more than incidentally decorative, thus, these garments should be classified under item 376.28, TSUS. So ORDERED.

(Slip Op. 88–22)

CORAGGIO DESIGN, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–5–00658

Before TSOUCALAS, *Judge*.

[Judgment for Defendant.]

(Decided February 19, 1988)

Glad & Ferguson (Steven B. Lehat) for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michael P. Maxwell)* for defendant.

OPINION

TSOUCALAS, *Judge:* This action is before the Court to determine the appropriate classification of fabric possessing "Continental" or pre-woven hems, imported from Italy in 1981. The Customs Service classified the merchandise under item 338.30, Tariff Schedules of the United States, ("TSUS"), as modified by T.D. 68/9, as woven fabrics, of man-made fibers: Other: * * * Other * * * 13 cents per lb. plus 22.5% *ad valorem*. Plaintiff challenges Customs' finding and contends the merchandise is properly classifiable under 389.62, TSUS, as modified by Presidential Proclamation No. 4707, as articles not specially provided for, of textile materials: Other articles, not ornamented: Of man-made fibers: Other: * * * Other * * * at 25 cents per lb. plus 15% *ad valorem*.

ISSUE

The issue to be resolved is whether the incorporation of the "Continental hem" into the fabric makes the material, as imported, more than mere fabric and a semi-finished drapery product, classifiable as an "article" in the basket provision, 389.62, TSUS; or whether the fabric is still "material" within item 338.30, TSUS, and not an "article," as addition of the hem results only in the fabric being "dedicated for use" as a drapery.

TRIAL

At the trial of this action, three witnesses testified on behalf of plaintiff and one witness testified on behalf of defendant. The testimony established that plaintiff purchased the subject merchandise directly from the mill in Italy in rolls or bolts of woven drapery fabric, approximately one hundred eighteen inches wide and fifty yards long. Trial Transcript at 3, 22, 27 (hereinafter "Tr. at ——"). The "Continental hem" is part of the fabric construction. It is incorporated into, roughly, the last sixteen to twenty-four inches of the product and is constructed by infusing additional heavier yarns on the bottom portion of the roll. *Id.* at 27. The hem serves three purposes: to stop the drapery from unravelling, to provide an esthetically pleasing drapery, and to offer weight at the bottom of the drapery enabling it to hang in a straight manner. *Id.* at 28. Functionally, it replaces the conventional sewn hem present in most draperies, which is made by turning over the fabric, and sewing weights in place. Thus, by pre-weaving the "Continental hem" at the mill, plaintiff saves significant costs, and cuts production time by up to twenty-five percent.

The material was identified by all witnesses as woven fabric. Tr. at 26, 103, 131, 165. Additionally, plaintiff purchases and sells the drapery fabric by the yard and imports it in the piece. It is uncontroverted that the inclusion of the hem renders the fabric unsuitable for any other purpose but for draperies.

DISCUSSION

It is clear that the involved merchandise is of the type contemplated by Congress to be included within item 338.30, TSUS. The headnote to Part 3, covering 338.30, specifically refers to woven fabrics "in the piece":

> This part covers all woven fabrics in the piece, of any width and with or without fast edges * * *.

Schedule 3, Part 3, Headnote 1, TSUS.

There is no doubt that plaintiff's goods were imported "in the piece."[1] The fabric was imported in bolts, the commercial invoices and testimony established that the cloth was sold by the yard, and all of plaintiff's witnesses testified that it was impossible to determine how many draperies would be made from a particular bolt.

The subject merchandise is also "woven" fabric. The "Continental hem" is constructed by doubling the warp threads in the bottom sixteen to twenty-four inches of the fabric. It is pre-woven into the fabric by use of a second warp beam. Thicker yarn is sometimes used for the purpose of constructing the hem. Thus, the "Continental hem" is not a hem in the traditional sense since it is not a "finished edge or border, made by folding back a fabric, and sewing it down." *Fairchild's Dictionary of Home Furnishings* 222 (1974). But it functions as a hem for drapery purposes, by preventing unravelling, adding esthetic beauty and ensuring straight drapery hanging. Additionally, all witnesses at trial agreed that the "Continental hem" was composed solely of warp threads and filling threads crossing each other at right angles; therefore, it conformed with the following definition of woven fabric in the *American Society of Testing and Materials Book of ASTM Standards*, 353 (1975):

> a planar structure produced by interlacing two or more sets of yarns, fibers, rovings, or filaments where the elements pass each other essentially at right angles and one set of elements is parallel to the fabric axis.

However, plaintiff asserts that the presence of the prewoven hem makes the involved merchandise a semi-finished drapery product and not merely woven fabric since it replaces a significant production step: the making of the lower sewn hem and the insertion of weights. This production step, however, to be sufficient to remove the subject merchandise from the purview of item 338.30, TSUS, must satisfy the rule of *United States* v. *Buss & Co.*, 5 Ct. Cust. Appls. 110, 113, T.D. 34138 (1914), which reads as follows:

> The rule expressed by the decisions just cited recognizes the fact that most small articles are not produced as individual or separate products of the loom, but for economy of manufacture are first woven "in the piece." The rule of decision is therefore established that where such articles are imported in the piece

[1] Piece goods are defined as "[f]abrics woven in lengths to be sold by the yard in retail stores. May also mean all goods which are not cut." *Fairchild's Dictionary of Textiles* 455 (6th ed. 1979).

> and nothing remains to be done except to cut them apart they shall be treated for dutiable purposes as if already cut apart and assessed according to their individual character or identity. This follows, however, *only in case the character or identity of the individual articles is fixed with certainty and in case the woven piece in its entirety is not commercially capable of any other use.* [Emphasis added.]

The *Buss* rule requires a two prong analysis: (1) whether the addition of the hem rendered the fabric commercially unsuitable for use as anything other than a drapery; (2) whether the addition of the hem enabled the actual individual drapery to be fixed with certainty. Plaintiff must prove the fabric meets both requirements iterated in *Buss* before the product can be classified as an "article" within the basket provision, 389.62, TSUS.

The Court finds that the production step of inserting the "Continental hem" comports with the first part of the *Buss* rule in that the addition of the hem dedicates the material in question for use solely as a drapery, commercially unsuitable for any other use. The imported merchandise fails to satisfy the second requirement of *Buss,* however, since the addition of the hem does not fix the identity of an individual drapery with certainty. It is well settled that "no matter how close the importation is to the finished article or how dedicated it is to a single use, it remains a material until the identify of actual articles can be seen emerging with certainty from the undifferentiated material." *Bendix Mouldings, Inc.* v. *United States,* 73 Cust. Ct. 204, 206, C.D. 4576, 388 F. Supp. 1193, 1194–95, (1974); *see also American Import Co.* v. *United States,* 26 CCPA 72, 75, T.D. 49612 (1938); *United States* v. *The Harding Co.,* 21 CCPA 307, T.D. 46830 (1933); *Permagrain Products, Inc.* v. *United States,* 9 CIT 426, 436, 623 F. Supp. 1246, 1254 (1985).

The subject merchandise is imported in rolls or bolts; the sizes and shapes of the draperies will vary according to the orders received; and the fabric is sold by the yard. A specific drapery cannot be seen emerging from the fabric. Rather, there remain significant processing steps after importation: the drapery fabric must be cut according to specifications; side hems, crinoline, and pleats must be added; and the drapery must be folded. *See* Plaintiff's Exhibit 3.

The exact point in the processing at which material becomes a partly finished article must be determined on the basis of the circumstances of each case. *J.B. Henriques, Inc.* v. *United States,* 46 CCPA 54, 56, C.A.D. 695 (1958); *see also Avins Industrial Products Co.* v. *United States,* 72 Cust. Ct. 43, 50, C.D. 4503, 376 F. Supp. 879, 885 (1974), *aff'd* 62 CCPA 83, C.A.D. 1150, 515 F.2d 782 (1975); *Sanwa Foods, Inc.* v. *United States,* 9 CIT 167, 169 (1985), *citing, United States (American Sponge & Chamois Co., Inc., Party in Interest)* v. *Nylonge Corporation,* 48 CCPA 55, C.A.D. 764 (1960). Several cases provide useful guidelines in making that determination.

In *The Harding Co.* v. *United States*, 23 CCPA 250, T.D. 48109 (1936), for example, the court held that material commercially suitable for use only for the manufacture of brake lining, imported in 100-foot rolls, not cut before importation, not marked for cutting, and not dedicated to the making of any *particular* brake lining, was "material" for the purpose of making automobile brake linings and not finished or unfinished parts of automobiles. The court determined that the material had to be something more than mere material for making brake lining; dedicating the material to use as a brake lining was not sufficient in and of itself.

In *American Import*, 26 CCPA 72, the court found 60-foot lengths of "silk fishing-leader gut" not sufficiently processed from the "material" stage to constitute an "article." All that remained in the manufacturing process after importation was "to cut the material to length and, after soaking to soften the same, tie the loops." *Id.* at 75. The mere fact that the involved merchandise was exclusively used for fishing leaders did not take it out of the "material" classification. *Id.*

In *Bendix*, 73 Cust. Ct. at 205–07, 388 F. Supp. at 1193–95, the court held that uncut wood moldings dedicated to use as picture frames but not dedicated to the making of *any particular frame* were not classifiable as unfinished frames; they were classifiable as only the material from which frames were made.

In *In Re Mills*, 56 Fed. 820 (1893), fabric in the piece was held to be improperly classified as partly made wearing apparel and was held dutiable as manufactures of cotton. The court stated that "it must at least be made up sufficiently far to enable us to identify the particular article of wearing apparel that is going to be made out of it." *Id.* at 821; *see also Terumo-America, Inc.* v. *United States*, 2 CIT 121, 124–25 (1981).

Plaintiff attempts to distinguish the above case law by relying on *Nylonge*, 48 CCPA 55, 61–63, and *Doherty-Barrow of Texas, Inc.* v. *United States*, 3 CIT 228, 235 (1982), claiming that product advancement and use are dispositive in determining whether the subject merchandise is "material" or an "article," not whether the merchandise had been cut.

However, plaintiff misinterprets the application of *Nylonge* and *Doherty-Barrow* to the instant action. In *Nylonge*, the court held that blocks of cellulose sponge material were properly classifiable as finished or partly finished sponges. The only process to which the sponges were subjected after importation was a slicing of the cellulose sponge loaves into pads of varying thickness. 48 CCPA at 62. Although this finding supports plaintiff's contention that goods need not be cut in order to be classified as "articles," the character of the product was not altered by the cutting. The court found that the importation was advanced to such an extent as to essentially constitute the end product. *Id.* at 63. Thus, the critical question focused upon *how far* the product was advanced in the production

process. *Id.* at 61. The case at bar is clearly distinguishable since completing the finished drapery required several important processing steps after importation. Additionally, the competing tariff provisions in *Nylonge* differentiated between "materials" and "finished or partly finished sponges." *See id.* at 57. The tariff provisions involved here do not make such a distinction. Whether an importation is characterized as a "material" or "article" will vary according to the statutory language of each case. *See Sanwa,* 9 CIT at 169.

The *Doherty-Barrow* court, in determining whether an imported metal was classifiable as "strips" or as "bale ties," held that the goods were bale ties even though they had not been cut. The court found that the goods had been manufactured in accordance with the specification for standard cotton baling ties, possessing the same chemical and physical qualities including width and gauge. 3 CIT at 234. Consequently, "cut to length" was not a prerequisite to classification as a bale tie under the applicable tariff provision. *Id.* The character or identity of the merchandise in issue was fixed with certainty.

Plaintiff next asserts that the present product is neither material nor an ultimate article but a discrete intermediate good as defined in *The Torrington Co.* v. *United States,* 8 CIT 150, 596 F. Supp. 1083 (1984). The articles in *Torrington,* however, were found to be "new and different articles of commerce." *Id.* at 155, 596 F. Supp. at 1087. In the process of becoming a "swaged needle blank," the name and character of certain wire changed completely. That is, the "wire" became a "swaged needle blank." *Id.* The incorporation of the "Continental hem" into the fabric on the other hand, does not transform the fabric into anything else; it is still drapery fabric. Therefore, plaintiff's reference to *Torrington,* is inapposite to the present case.

As the rule of *Buss* and its progeny make apparent, material cannot be classified as more than woven fabric when it is not processed to the point where the individual "article" is identifiable with certainty, not cut to specific lengths or marked for cutting, and not advanced to a point where significant processing steps no longer remain. The material is merely drapery fabric out of which finished draperies are made.

CONCLUSION

It is the finding of this Court that the drapery fabric is not discernible as an individual article and not significantly advanced in the manufacturing process to be more than material from which draperies are made. Thus, the Customs Service properly classified the product as a woven fabric of man-made material under item 338.30, TSUS.

(Slip Op. 88–23)

COPPERWELD CORP., UNR-LEAVITT, DIV. UNR, INC., AND WELDED TUBE CO. OF AMERICA, PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, TITAN INDUSTRIAL CORP., DEFENDANT-INTERVENORS

Court No. 86-03-00338

Before CARMAN, *Judge.*

[Plaintiffs' motion for judgment on the agency record is denied.]

(Decided February 24, 1988)

Schagrin Associates (*Roger B. Schagrin* and *Paul W. Jameson* on the motion) for the plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Kevin Horgan* on the motion) and *Lyn M. Schlitt,* General Counsel, *Michael P. Mabile,* Assistant General Counsel, United States International Trade Commission (*Jack M. Simmons, III* and *Edwin J. Madaj, Jr.* on the motion) for the defendants.

Dow, Lownes & Albertson (*William Silverman, Leslie H. Wiesenfelder,* and *Michael P. House* on the motion) for the defendant-intervenor.

Dewey, Ballantine, Bushby Palmer and Wood (*Michael H. Stein* on the motion) for the *amicus curiae,* Lone Star Steel Company, Inc.

MEMORANDUM OPINION

CARMAN, *Judge:* Plaintiffs, Copperweld Corp., UNR-Leavitt, Div. UNR, Inc., and Welded Tube Company of America move for judgment on the agency record pursuant to rule 56.1(c)(1) of the Rules of this Court. Plaintiffs challenge the final negative determination by the International Trade Commission (ITC or Commission) in *Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada,* Inv. No. 731–TA–254 (Final), USITC Pub. No. 1808 (February, 1986) [*Rectangular Pipes and Tubes from Canada (Final)*]. The ITC determined that the U.S. industry producing this product was not being materially injured or threatened with material injury by reason of the imports of this product from Canada.

Plaintiffs advance several arguments in support of their motion. Plaintiffs contend that the ITC is prohibited from considering the dumping of LTFV margin as a discretionary "other factor" in an injury determination. They urge that some Commissioners decline to examine evidence of price underselling. Plaintiffs also contend that one of the Commissioners applies an erroneous causation analysis. Finally, plaintiffs argue that there is insufficient evidence in the record for the determination that the domestic industry was neither materially injured nor threatened with material injury by reason of the imports from Canada.

For the reasons that follow, the Court finds the determination of the ITC in *Rectangular Pipes and Tubes from Canada (Final)* is supported by substantial evidence in the record and otherwise in ac-

cordance with law. Plaintiffs' motion for judgment on the agency record is therefore denied.

FACTS

On March 25, 1985, a petition was filed on behalf of the structural tubing subcommittee of the Committee on Pipe and Tube Imports and the individual producer members of that subcommittee including the plaintiffs. The petitioners alleged that imports of heavy-walled rectangular welded carbon steel pipes and tubes from Canada (H–WR) are being or are likely to be sold in the United States at less than fair value (LTFV) and that these imports are materially injuring or threatening material injury to a United States industry.

On April 15, 1985, the International Trade Administration (ITA) initiated a LTFV investigation. *Certain Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada; Initiation of Antidumping Duty Investigation,* 50 Fed. Reg. 15771 (April 22, 1985). The ITC thereupon issued a preliminary determination that imports of H–WR are materially injuring a U.S. industry. *Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada,* Inv. No. 731–TA–254 (Preliminary), USITC Pub. No. 1691 (May, 1985) [*Rectangular Pipes and Tubes from Canada (Preliminary)*].

One of the companies investigated was the defendant-intervenor, Titan Industrial Corp. (Titan). Titan, the largest importer of the subject merchandise, and a U.S. company, accounts for approximately 80% of the imports of the product under investigation. Titan purchases steel coil in Canada, converts the coil into finished H–WR, and sells the H–WR in the United States. Titan does not sell the finished H–WR in Canada.

Notice of the ITA's preliminary negative determination was published on September 10, 1985. *Certain Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada; Preliminary Determination of Sales at Not Less Than Fair Value,* 50 Fed. Reg. 36910 (Sept. 10, 1985). The ITA determined that a dumping margin of 0.47% for Titan and 0.10% for Acier Royalcor Steel, Inc. (Royalcor) were *de minimis.*

On November 22, 1985, notice of the ITA's final affirmative determination was published. *See Certain Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada; Final Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 48238 (Nov. 22, 1985). The dumping margin for Titan was found to be 0.65%.[1]

Following a hearing before the Commissioners, the ITC voted 5–1 that an industry in the United States is not materially injured or threatened with material injury by reason of the imports of H–WR from Canada.

[1] A *de minimis* dumping margin of 0.15% was found for Royalcor. Plaintiffs are not contesting the part of the determination pertaining to Royalcor.

In the final determination, the views of a plurality of Commissioners, Chairwoman Stern, Vice Chairman Liebler, and Commissioner Brunsdale were published as a single opinion.[2] These Commissioners based their determination primarily on the lack of any causal connection between the imports from Canada and the condition of the domestic industry. *Rectangular Pipes and Tubes from Canada (Final), supra,* at 3. They determined that there was no material injury by reason of imports and made the following findings:

> In determining whether there is material injury to the domestic industry "by reason of" the imports subject to the investigation, the Commission must consider, among other factors, the volume of imports, the effect of the LTFV imports on prices in the United States for the like product, and the impact of such imports on the relevant domestic industry. In this investigation, we find that there is no material injury by reason of the imports. This conclusion rests principally on findings of: no significant increase in import market share in an expanding market; no significant impact on prices; increases in U.S. production, domestic shipments, and capital expenditures; and the extremely low weighted average dumping margin found by the Department of Commerce.

Rectangular Pipes and Tubes from Canada (Final), supra, at 8–9 (footnotes omitted). The concurring views of Commissioners Lodwick and Rohr were also published in a separate opinion. While generally agreeing with the plurality's conclusion that the domestic H–WR industry is not materially injured or threatened with material injury by reason of H–WR imports from Canada, Commissioners Lodwick and Rohr concluded that the U.S. industry is experiencing material injury. They emphasized that the information does not "support the conclusion that Canadian imports are a *cause* of material injury to the domestic industry." *Id.* at 23 (emphasis supplied).[3]

BACKGROUND

In a final antidumping duty investigation, the ITC is directed to ascertain whether:

> (A) an industry in the United States—
>
> (i) is materially injured, or
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,

by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section.

[2] The vote of three of six Commissioners constitutes a plurality sufficient to support an affirmative determination. *See* 19 U.S.C. § 1677(11).
[3] Commissioner Eckes filed a dissenting opinion.

19 U.S.C.A. § 1673d(b) (1980 & Supp. 1986). Material injury is "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C.A. § 1677(7)(A) (1980).

In an investigation under § 1673d(b), the ITC is required to consider the following factors, among others:

> (i) the volume of imports of the merchandise which is the subject of the investigation,
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
> (iii) the impact of imports of such merchandise on domestic producers of like products.

19 U.S.C.A. § 1677(7)(B) (1980). In evaluating the volume, price effects, and impact on the domestic industry of the imports, the ITC must consider the following:

> (i) **Volume.**—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
> (ii) **Price.**—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> > (I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
> > (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> (iii) **Impact on affected industry.**—In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—
>
> > (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> > (II) factors affecting domestic prices, and
> > (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

19 U.S.C.A. § 1677(7)(C) (1980).

By contrast, in an evaluation of *threat* of material injury, the ITC must consider the following relevant economic factors, among others:

> (I) If a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement),

(II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury, and

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 1671 or 1673 of this title or to find [sic] orders under section 1671e or 1673e of this title, are also used to produce the merchandise under investigation.

19 U.S.C.A. § 1677(7)(F)(i) (1980 & Supp. 1986). A determination of threat of material injury must be based on evidence that the threat of injury is "real and that actual injury is imminent." The determination may not be based on mere conjecture or supposition. 19 U.S.C.A. § 1677(7)(F)(ii) (1980 & Supp. 1986). *See also American Spring Wire Corp.* v. *United States*, 8 CIT 20, 28 n.8, 590 F. Supp. 1273, 1281 n.8 (1984).

If the ITC makes a final negative determination of material injury or threat of material injury under § 1673d, review on the record is available in this Court within 30 days from the date on which the final determination is published in the Federal Register. 19 U.S.C.A. § 1516a(a)(2) (1980 & Supp. 1986). This Court must hold unlawful any determination, finding, or conclusion found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.A § 1516a(b)(1)(B) (1980).

Discussion

I. LTFV Margin

Referring to the plurality opinion of Commissioners Stern, Liebeler, and Brunsdale, the plaintiffs and *amicus* contend the ITC is prohibited from considering the dumping margin in an injury determination.[4] In support of this argument, the plaintiffs and *amicus*

[4] In their briefs, the plaintiffs and *amicus curiae* use the term "margins analysis" loosely to connote the consideration of the margins given by Commissioners Stern, Liebeler, and Brunsdale. There are, however, several definitions of the term "margins analysis." Assuming margins analysis requires a comparison between the margin of dumping and the margin of underselling as urged by the plaintiffs and *amicus*, the Court does not find the plurality utilized this type of analysis. The opinion of Commissioners Stern, Liebeler, and Brunsdale, does not use the term "margins analysis." There is also no refer-

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rely upon the plain language of § 1677(7) which requires the ITC determine whether material injury is by reason of the imports. They contend that the ITC actually rules that there was no material injury by reason of *dumping*. Plaintiffs and the *amicus* challenge reliance upon the legislative history of the 1979 Act and the Subsidies and Antidumping Codes to justify use of margins in an injury determination. Plaintiffs also urge for pragmatic reasons that dumping margins should not be a factor in the analysis.

By contrast, both the defendant and the defendant-intervenor maintain that the ITC is permitted to consider the dumping margin as an "other factor" in assessing the effects of the imports on the domestic industry. They rely upon the principle that an agency charged with administration of a particular law is given broad discretion to construe a law that is silent or ambiguous on a specific issue. *See Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1983).

The first issue involves the extent of reliance placed upon the dumping margin by Commissioners Stern, Liebeler, and Brunsdale. Plaintiffs and *amicus* urge that in actuality the Commissioners did not consider the dumping margin a factor to be taken into account. Rather, they assert, the Commissioners ruled that there was no material injury by reason of the dumping. In essence, they argue, the Commissioners ignored the requirement to base a finding of injury on the imports as the statute requires. In support of this argument plaintiffs allude to the following sentences at page 14 of the opinion:

> With a dumping margin of only 0.65 percent, the price of the imported product would have increased in the absence of LTFV sales at almost 65 cents for every $100.00 of imports. Given this extremely low dumping margin, a very special set of circumstances would have to exist in the domestic market for imports to cause injury to the domestic industry. Such special circumstances are not found in this investigation.

Rectangular Pipes and Tubes from Canada (Final), supra, at 14 (footnote omitted).

When considered in the context of the entire plurality opinion, these sentences provide little support for the view the plurality ignored the requirement to base a finding of injury on the *imports* as the statute requires. The opinion clearly provides that Commissioners Liebeler, Stern, and Brunsdale recognized the need to consider, among other factors, the volume of imports, the effect of the LTFV imports on prices in the U.S. for the like product, and the impact of the imports on the domestic industry. *See id.* at 8–9. The plurality determined there was no material injury by reason of the imports. *Id.* at 9. They based this conclusion on several causal factors, one of

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ence to the margin of underselling which is a requisite element in the type of "margins analysis" referred to by the plaintiffs and *amicus*. Hence, the Court declines to adopt the term "margins analysis" when referring to the analysis utilized by the plurality. Furthermore, since the Court holds that the plurality did not engage in "margins analysis," there is no need to address the specific arguments made by the parties against the use of "margins analysis."

which was the extremely low weighted average dumping margin found by the Department of Commerce. *Id.* The Court accepts the defendant's explanation that "[t]hese Commissioners added to that analysis, as an additional factor, consideration of the LTFV margin, which they considered in the market context of this case, and examined the size of the LTFV margin as *a gloss on their analysis of pricing factors.*" Brief of Defendants at 30, *Copperweld Corp.* v. *United States and United States International Trade Commission,* Court No. 86–03–00338 (footnote omitted) (emphasis supplied).[5]

Plaintiffs and the *amicus* contend that the ITC is prohibited from considering the dumping margin in an injury determination. They urge that consideration of the margins is completely irrelevant to the analysis. Whether or not the ITC is *permitted* to consider margins, it is clear that Congress has not mandated consideration of dumping margins in an injury determination.[6] *See Maine Potato Council* v. *United States,* 9 CIT 293, 297–99, 613 F. Supp. 1237, 1241–43 (1985). This Court has even held that since "neither the statute nor those parts of the legislative history cited by [the parties] specifically prohibit the use of margins analysis as a factor in determining injury[,]" the ITC may consider margins as a factor in determining injury. *See Hyundai Pipe Co.* v. *United States International Trade Commission,* —— CIT ——, ——, Slip Op. 87–18 at 7 (Feb. 23, 1987).

Section 1677(7)(B) provides that the ITC "shall consider *among other factors,*" the volume of imports, the effect of imports on prices for the like product in the U.S., and the impact of the imports on domestic producers of like products. Congress did not specify what other factors may be considered. Congress chose to leave the matter to the discretion of the ITC:

> [T]he Commission must satisfy itself that, in light of all the information presented, there is a sufficient causal link between the less-than-fair-value imports and the requisite injury. The determination of the ITC with respect to causation is, under current law, and will be, under section 735, complex and difficult, and is a matter for the judgment of the ITC.

S. Rep. No. 249, 96th Cong., 1st Sess. 75, *reprinted in,* 1979 U.S. Code Cong. & Admin. News 381, 461. In this regard, when a statute is ambiguous with regard to the meaning of a particular term, a reviewing court must defer to a reasonable agency interpretation of that term:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress

[5] As will be discussed below, there is sufficient support in the legislative history for consideration of the dumping margin to analyze the price effects of the imported product.

[6] The Court observes that if Congress had intended mandatory consideration of dumping margins in an injury determination, Congress would have included this factor as a requisite element of § 1677(7)(B) as it did with volume and price.

> has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute * * *. [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Young v. *Community Nutrition Institute,* —— U.S. ——, ——, 106 Sup. Ct. 2360, 2364 (1986) (quoting *Chevron U.S.A.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–44 (1984) (footnotes omitted)).

It is therefore essential to refer to extraneous sources to ascertain the reasonableness of the agency's interpretation that the dumping margin may be considered as an "other factor" in an injury determination.[7] Section 1677(7)(C)(iii) expressly provides that in examining the impact on the affected industry, the ITC "shall evaluate all relevant economic factors which have a bearing on the state of the industry * * *." The Committee Report evinces congressional endorsement of the ITC's practice of considering the dumping margin a relevant factor in assessing the impact of the imported product on the domestic market:

> In determining whether injury is "by reason of" less-than-fair-value imports, the ITC now looks at the effects of such imports on the domestic industry. The ITC investigates the conditions of trade and competition and the general condition and structure of the relevant industry. It also considers, among other factors, the quantity, nature, and rate of importation of the imports subject to the investigation, *and how the effects of the margin of dumping relate to the injury, if any, to the domestic industry.* Current ITC practice with respect to which imports will be considered in determining the impact on the U.S. industry is continued under the bill.

S. Rep. No. 249, 96th Cong., 1st Sess. 74, *reprinted in,* 1979 U.S. Code Cong. & Admin. News 381, 461 (emphasis added). It appears the ITC could reasonably conclude that the dumping margin has some relevance in this regard. This is particularly true since plaintiffs have failed to persuade the Court that the dumping margin is irrelevant to the analysis. *See* 28 U.S.C. § 2639(a)(1) (1982).[8] Furthermore, although legitimate concerns against the use of the dumping

[7] Plaintiffs contend that the opinion of three commissioners does not constitute "agency interpretation." However, in establishing the United States International Trade Commission (formerly the U.S. Tariff Commission), Congress created a scheme whereby six commissioners appointed by the President, by and with the advice and consent of the Senate would comprise the central decision-making body of the agency. 19 U.S.C. § 1330(a) (1980). Congress specified that each of the commissioners would possess the requisite knowledge to exercise expertise in administering the duties and functions of the agency. *Id.* Congress recognized that these commissioners might not concur in rendering decisions. *See, e.g.,* 19 U.S.C. § 1330(d). Congress specified that the vote of three of six commissioners would constitute a plurality sufficient to support an affirmative determination. *See supra* note 2. To hold that agency action can never be taken unless all of the commissioners or more than three of six commissioners concur is tantamount to disregard for the delicate scheme devised and implemented by Congress.

[8] This subsection provides in pertinent part:

> "[I]n any civil action commenced in the Court of International Trade * * * under section 516A of the Tariff Act of 1930, the decision of * * * the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision."

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margin have been expressed, they are insufficient to establish a legal bar to the exercise of discretion by a commissioner.

The legislative history of the 1979 Act makes it manifestly certain that Congress vested the ITC with broad discretion to determine what other factors may be considered in making an injury determination:

> In determining whether an industry is materially injured, as that phrase is used in the bill, the ITC will consider, to the extent permitted by information submitted to it in a timely manner, the factors set forth in section 771(7)(C) and (D) *together with any other factors it deems relevant* * * *. It is expected that in its investigation the Commission will continue to focus on the conditions of trade, competition, and development regarding the industry concerned. For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant. Similarly, for one type of product, price may be the key factor in making a decision as to which product to purchase and *a small price differential resulting from the amount of the subsidy or the margin of dumping can be decisive;* for others, the size of the differential may be of lesser significance.

S. Rep. No. 249, 96th Cong., 1st Sess, 88, *reprinted in*, 1979 U.S. Code Cong. & Admin. News 381, 474 (emphasis added). The logical inference from this passage is that, while Congress has vested the ITC with broad discretion to determine what other factors may be considered, the margin of dumping may be a relevant factor in assessing the effects of the price of the imported product in the domestic market.

Plaintiffs argue that if dumping margins were intended by Congress to be considered, Congress would have provided for different consideration of this factor in a preliminary investigation. It bears repeating, however, that Congress did not mandate consideration of margins in a final investigation. *See Maine Potato Council*, 9 CIT at 297–99, 613 F. Supp. at 1241–43. Nevertheless, the ITC is empowered to assign to a factor a varying degree of significance depending upon the facts of a particular case:

> *The significance of the various factors affecting an industry will depend upon the facts* of each particular case. Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured, and *the significance to be assigned to a particular factor is for the ITC to decide.*

S. Rep. No. 249, 96th Cong., 1st Sess. 88 *reprinted in*, 1979 U.S. Code Cong. & Admin. News 381, 474 (emphasis supplied). *See also Maine Potato Council*, 9 CIT at 300, 613 F. Supp. at 1244. Although the Court does not decide this issue, it appears that the ITC could as-

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28 U.S.C.A. § 2639(a)(1) (1980 & Supp. 1986). Plaintiffs contend that the dumping margin and the margin of underselling measure two totally different matters and are calculated for different periods of time. While there may be some merit to these arguments, they are more properly directed to the weight of the evidence before the ITC. Neither argument demonstrates the irrelevance of the dumping margin to the analysis.

sign to the dumping margin alleged in the petition such weight as is appropriate under the circumstances.[9]

Plaintiffs contend that the revised Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature* April 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 (entered into force Jan. 1, 1980) [Antidumping Code or Code][10] does not authorize consideration of the dumping margin. The *amicus* contends that the Antidumping Code cannot be interpreted to require consideration of the margins.

Plaintiffs' principal concern focuses upon a footnote at the end of the discussion regarding the dumping margin in the opinion of Commissioners Stern, Liebeler, and Brunsdale. The footnote refers to a memorandum from the Director of the Office of Economics which allegedly supports consideration of margins in an injury determination.[11] According to the plaintiffs, the analysis in the memo is erroneous.

Plaintiffs argue that the memo relies upon one phrase in art. 3, paragraph 4 of the Antidumping Code to support its thesis. This phrase, plaintiffs assert, conflicts with the remainder of the Code which consistently utilizes the language effects of the "dumped *imports*."[12] Article 3, paragraph 4 utilizes the term "through the effects of dumping" as follows:

> 4. It must be demonstrated that the dumped imports are, through the *effects of dumping*, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

Antidumping Code, *supra*, art. 3, para. 4 (footnotes omitted) (emphasis added).

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[9] In arguing that consideration of the LTFV margin is inconsistent with or irrelevant to the factors enumerated at § 1677(7), plaintiffs and *amicus* appear to rely upon the doctrine of *ejusdem generis*. This doctrine provides that "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are * * * to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law Dictionary 464 (5th ed. 1979). Plaintiffs and *amicus* therefore urge that since the LTFV margin is not within the class defined by the statute, i.e., volume, price, and impact of the imports, the ITC is prohibited from considering the margin. *Ejusdem generis*, however, does not apply if there is a clear manifestation of a contrary legislative intent. *See* 2A N. Singer, Sutherland Stat. Const., § 47.22 (4th ed. 1979). *See also Sawhill Tubular Div* v. *United States*, 11 CIT ——, ——, Slip. Op. 87–80 at 11 (July 13, 1987). As indicated above, Congress intended the ITC be given broad discretion to determine what "other factors" may be considered by the agency in an injury determination.

[10] The Antidumping Code is a revised or second version of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature* June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431, 651 U.N.T.S. 320 (entered into force July 1, 1968). For a discussion of the relationship between the first and second Codes, *see* E. McGovern, International Trade Regulation 334–35 (2d ed. 1986).

[11] The footnote provides: "The Memorandum from Director, Office of Economics, EC–J–010 (January 7, 1986) provides an interesting general discussion of some economic factors and methodology relating to title VII." *Rectangular Pipes and Tubes from Canada (Final)*, *supra*, at 14 n.33. From this language, the Court observes that the extent of reliance placed upon this memorandum is questionable.

[12] Among the provisions utilizing this language are the following:

> 1. A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the *volume of the dumped imports and their effect on prices* in the domestic market for like products, and (b) the consequent *impact of these imports* on domestic producers of such products.

Antidumping Code, *supra*, art. 3, para. 1 (emphasis added).

> 5. The *effect of the dumped imports* shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the *effects of the dumped imports* shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

Id. art. 3, para. 5.

The footnote after "effects" in paragraph 4 provides: "As set forth in paragraphs 2 and 3 of this Article." According to the plaintiffs, paragraphs 2 and 3 follow the language of 19 U.S.C. § 1677(7)(C) of the Act and accordingly permit consideration of only the volume of the imports, the price of the imports compared to the domestic prices of the product, and the impact of the imports on the domestic industry.

The *amicus* urges that the Antidumping Code does not require consideration of the margins. In *Hyundai Pipe Co.* v. *United States International Trade Commission,* Slip Op. 87–18 at 8–10 (Feb. 23, 1987), this Court concluded that, since article 3, paragraph 2 did not refer to margins, the Code did not *mandate* consideration of margins in an injury determination.

The plaintiffs urge that the Code *prohibits* consideration of the LTFV margin. Although plaintiffs are correct that the language of article 3, paragraph 3 follows the language of § 1677(7)(C)(iii), the language contained in both provisions authorizes the consideration of all relevant factors having a bearing on the state of the industry. Article 3, paragraph 3 contains an enumeration of factors to be considered in assessing the impact of the imports on the industry and provides that the list is not exhaustive:

> 3. The examination of the impact on the industry concerned shall include an evaluation of *all relevant economic factors and indices having a bearing on the state of the industry* such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. *This list is not exhaustive,* nor can one or several of these factors necessarily give decisive guidance.

Antidumping Code, *supra,* art. 3, para. 3 (emphasis added).

Since the language of this article closely follows the language of 19 U.S.C. § 1677(7)(C)(iii) to the extent of allowing consideration of all relevant economic factors, the Court holds that there is no conflict between § 1677(7)(C) and the Antidumping Code. *See also United States Steel Corp.* v. *United States,* 9 CIT 453, 457, 618 F. Supp. 496, 500–01 (1985) (referring to the Trade Agreements Act of 1979 and the Subsidies Code, "the objective of G.A.T.T. consistency was embodied in the Act"). In considering the LTFV margin one of the relevant economic factors affecting the domestic industry, Commissioners Stern, Liebeler, and Brunsdale acted in accordance with the Antidumping Code.

Plaintiffs contend, however, that while there have been several determinations under the Antidumping Act of 1921 in which margins analysis was used, margins analysis has been rejected by a majority of the Commissioners as well as a former General Counsel of the ITC. In support of this argument, plaintiffs allude to *Certain*

Carbon Steel Products From Spain, Inv. Nos. 701–TA–155, 157–60, 162 (Final), USITC Pub. 1331 (December, 1982). Plaintiffs cite a portion of the opinion of the then Chairman Eckes and Commissioner Haggart which provides in pertinent part as follows:

> The statute does not direct the Commission to consider the amount of the net subsidy in determining whether there is material injury. At most, the amount of the net subsidy is a factor which the Commission may consider under section 771(7)(B) of the Act.

Id. at 14. The Court finds this determination is no bar to consideration of the dumping margins (or net subsidy) as a discretionary factor under § 1677(7). On the contrary, the cited passage confirms the position of this Court that consideration of the margins is neither required nor proscribed by the governing statute. As previously discussed, Commissioners Stern, Liebeler, and Brunsdale considered the LTFV margin as a permissible "other factor" in their analysis of material injury to the domestic industry. Their interpretation of the relevant statute is entitled to great weight. *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 928 (Fed. Cir. 1984).

Plaintiffs also urge that the former General Counsel of the ITC rejected the use of margins analysis in a memorandum to Commissioner Stern. Although the Court deems a memorandum from a former official of an agency charged with administration of a statute to be persuasive authority, such a memorandum cannot be held an official pronouncement by the agency of the meaning of that statute. Furthermore, it appears that the former General Counsel did not state that consideration of the margin would be unlawful. He merely stated his position that "the amount of the margin is not an important *factor* in a Commission determination." Memorandum GC–E–065 (March 17, 1981). The memorandum therefore does not conflict with the view that the ITC may but is not required to consider the LTFV margin in its analysis of material injury. That the General Counsel finds this factor not entitled to much weight does not affect this conclusion.

Both the defendant and defendant-intervenor take the position that Congress was aware of the ITC's established practice of considering the size of the dumping margin as a factor in its analysis and endorsed this practice in the 1979 Act. The *amicus* contends that there were two separate types of "margins analysis" prior to the passage of the 1979 Act and that therefore Congress did not know and could not have known which practice it was endorsing. Assuming the *amicus* is correct that there were two types of margins analyses, in a considerable number of cases during this timeframe, the ITC considered the dumping margin a factor in its analysis. Congress understood that in analyzing the effects of the LTFV imports, the ITC considers "among other factors * * * how the effects of the margin of dumping relate to the injury, if any, to the domestic industry." S. Rep. No. 249, 96th Cong. 1st. Sess. at 74, *reprinted in,*

1979 U.S. Code Cong. & Admin. News 381, 460. Congress intended this practice be continued "with respect to which imports will be considered in determining the impact on the U.S. industry * * *." *Id.*

II. Price Underselling

In evaluating the effect of the imports on prices, Congress has required the ITC to consider whether "there has been *significant* price undercutting by the imported merchandise as compared with the price of like products of the United States * * *." 19 U.S.C. § 1677(7)(C)(ii)(I). There is little indication of what Congress intended by use of the term "significant price undercutting." It is clear however, that Congress has vested the ITC with broad discretion "to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council*, 9 CIT at 300, 613 F. Supp. at 1244.

During the investigation in the case at bar, the ITC requested price data from United States producers and importers concerning the largest sale in each quarter for each of the four product specifications sold to both end users and service center/distributors. The ITC compared domestic producers' prices with the prices of all Canadian imports and with Titan's prices.

On the basis of this data, Commissioners Stern, Liebeler, and Brunsdale determined that price trends for the Canadian and the domestic market behaved similarly throughout the period of investigation. *Rectangular Pipes and Tubes from Canada (Final), supra*, at 10. They also found that there was no overall pattern of underselling by the Canadian product. *Id.* at 10–11. Commissioners Lodwick and Rohr arrived at similar conclusions:

> Our examination of pricing factors, as required by statute, indicates that Canadian imports have not had a price depressing or suppressing effect. We note that there is no pattern of consistent Canadian underselling of the domestic industry. There are instances of both underselling and overselling, which supports the information gathered by Commission investigators that this is a very competitive market. The information also indicates that domestic producers have most frequently been the price leaders in this market. Rather, data from purchasers indicate that prices for imports from Canada are as likely to be higher than domestic prices as they are to be lower.

Id. at 23.

Referring to the plurality opinion of Chairwoman Stern, Vice Chairman Liebeler, and Commissioner Brusndale, plaintiffs contend that Commissioners Liebeler and Brunsdale unlawfully departed from § 1677(7)(c)(iii)(I) by not considering evidence of underselling. According to the plaintiffs, Commissioners Liebeler and Brunsdale believe that only in the instance of apparent predatory pricing would there be actual underselling. Plaintiffs urge that such a conclusion is flawed.

Of immediate concern to the plaintiffs is a footnote to the plurality's finding of no overall pattern of underselling by the Canadian product:

> Vice Chairman Liebeler and Commissioner Brunsdale believe that evidence of underselling is ordinarily not probative on the issue of causation. They do not find the particular data on underselling gathered by the Commission useful. Chairwoman Stern believes that evidence of underselling should be used only with caution.
>
> In this case, we note that the relevant products are not usually the same (i.e. homogeneous) for different suppliers, Hence prices received by different suppliers are expected to vary and price differences among firms can persist over time. Thus, the observed price differences among firms are not helpful in analyzing causation. *See* Memorandum from Director, Office of Economics, EC–J–010 (January 7, 1986), at 8–22.
>
> Vice Chairman Liebeler's views are more fully set forth in Certain Table Wine from the Federal Republic of Germany, France, and Italy, Invs. No. 701–TA–258–60 and 731–TA–283–85 (Preliminary), USITC Pub. 1771 at 34–36 (1985) (Additional Views of Vice Chairman Liebeler).

Rectangular Pipes and Tubes from Canada (Final), supra, at 11 n.25. In challenging this footnote, plaintiffs refer to the authorities cited by the Commissioners.

The Court agrees with the plaintiffs that § 1677(7)(C)(iii)(I) by its very terms requires the ITC, in evaluating the effects of imports on prices to consider whether "there has been *significant* price undercutting by the imported merchandise as compared with the price of like products of the United States * * *." *Id.* (emphasis added). Congress recognized, however, that the significance of the various factors affecting an industry would depend upon the facts of each case. S. Rep. No. 249, 96th Cong., 1st Sess. 88, *reprinted in,* 1979 U.S. Code Cong. & Admin. News 381, 474. Congress therefore chose to give the ITC broad discretion in analyzing and assessing the significance of the evidence on price undercutting. *Id.*

Contrary to the plaintiffs' allegation, the Court finds the Commissioners did not ignore the evidence of underselling. As required, they considered this evidence and found no overall pattern of underselling by the Canadian product. *Rectangular Pipes and Tubes from Canada (Final), supra,* at 10–11. That the Commissioners stated that "evidence of underselling is ordinarily not probative on the issue of causation," and "that evidence of underselling should be used only with caution," does not render the determination invalid. The ITC has discretion to assign relative significance to a particular factor. Both statements are directed to the weight of the evidence of underselling presented. The statements do not imply that the evidence of underselling was ignored.

Furthermore, given the power to assign relative weight to the significance of the evidence of undercutting, the defendant's explana-

tion as to why evidence of underselling must be used cautiously is not a post-hoc rationalization. It is consistent with the view that the ITC can exercise discretion in assessing the factors germane to the analysis.

Plaintiffs argue, however, that there is insufficient evidence in the record to support the ITC's conclusions regarding price undercutting. As previously stated, this Court is bound to sustain a final injury determination unless it is "unsupported by substantial evidence on the record, or is otherwise not in accordance with law." 19 U.S.C. § 1516a(a)(2). This standard is universally recognized to comprise the following:

> "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951), *quoted in Penntech Papers, Inc.* v. *NLRB*, 706 F.2d 18, 22 (1st Cir.), *cert. denied*, 104 S.Ct. 237 (1983). *Accord Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 619–20 (1966). Taking into account " 'whatever in the record fairly detracts' from the [agency's] fact finding as well as evidence that supports it,["] *Penntech, supra*, 706 F.2d at 22 (quoting *Universal Camera, supra*, 430 U.S. at 487–88), "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* * * *.' " *Id.* at 22–23 (quoting *Universal Camera, supra*, 340 U.S. at 488).

American Spring Wire Co, 8 CIT at 22, 590 F. Supp. at 1276.

In applying this standard, the Court finds there is ample evidence in the record to support the ITC's findings with regard to "significant price undercutting" by the Canadian product. All five of the Commissioners in the majority found that the evidence concerning price undercutting was "mixed." When the ITC has found a "mixed pattern" of price underselling information, the ITC has found that the statutory standard of significant price undercutting has not been met. *See, e.g., Certain Carbon Steel Products From Austria and Sweden*, Inv. Nos. 701–TA–225, 227–28, 230–31 (Final), USITC Pub. 1759 at 12–13 (September, 1985) (negative determination based on mixed pattern of overselling and underselling); *Carbon Steel Structural Shapes From Norway*, Inv. No. 731–TA–234 (Final), USITC Pub. 1785 at 10 (November, 1985).

Plaintiffs further argue that the information on prices to service centers should not have been weighed equally with prices to end users. In the plaintiffs' view, proportional weighting would result in a finding of significant price undercutting by the Canadian product. Plaintiffs also urge that the ITC should have taken into account the volume of the sales transactions under investigation. According to the plaintiffs, if the ITC had compared the total dollar value of the underselling by the Canadians to the total dollar value of their overselling, the ITC would have found significant price undercut-

ting. However, neither the governing statute nor its legislative history require the ITC to adopt any particular analysis when the market consists of several segments. Furthermore, since it does not appear that plaintiffs argued before the ITC that a sectoral analysis should be conducted, though they were aware of the underlying facts, plaintiffs may not make this argument for the first time in this Court. *See, e.g.,* List No. 1 of the Administrative Record, Pub. Doc. 51 at A–20 n.2, *Copperweld Corp.* v. *United States,* Court No. 86–03–00338 [Pub. Doc.]. With regard to the volume of the sales transactions under investigation, plaintiffs have not cited any authority which requires the ITC conduct such an analysis.

As its final challenge of the ITC's findings regarding price underselling, plaintiffs criticize the pricing calculations made by the ITC. Plaintiffs maintain that the ITC should have factored into the analysis, the value of freight absorption and other services offered by Titan on the Canadian product. In the plaintiffs' view, these factors are additional costs which should be quantified so that the prices measured reflect the true level of underselling.

It has been held that the relevant statutory provision neither mandates nor authorizes cost analysis or adjustment of prices for cost factors:

> First, 19 U.S.C. § 1677(7)(C)(ii)(I), which requires the Commission to consider whether "there has been significant price undercutting by the imported merchandise as compared with the price of like products in the United States" focuses solely on *prices* and does not mandate any *cost* analysis or adjustment of prices for cost factors respecting the purchase of the imported product. Ignoring the plain language of the statute, which as mentioned above focuses solely on actual prices, plaintiffs' attempt to extrapolate fictitious "prices" by utilizing a cost adjustment factor. The short answer is that the statute does not authorize such adjustment of prices.

British Steel Corp. v. *United States,* 8 CIT 86, 95, 593 F. Supp. 405, 412 (1984). Furthermore, with regard to freight absorption costs, the information obtained by the ITC was specifically designed to eliminate the differences in transportation costs. The instructions to the pricing section of the questionnaires utilized by the ITC explicitly provided that "[p]rices must represent arm's length transactions, should be net of all discounts, allowances, rebates, and other deductions, should include the value of any premium to your firm, and *should exclude the cost of freight to your customers."* List No. 2 of the Administrative Record, Conf. Doc. 37.26 at 18, *Copperweld Corp* v. *United States,* Court No. 86–03–00338 [Conf. Doc.].

III. Vice Chairman Liebler's Five Factor Analysis

Plaintiffs contend that Vice Chairman Liebler substituted five factors for those which are enumerated at § 1677(7). This issue involves footnote 20 of the plurality opinion which provides as follows:

> Vice Chairman Liebler finds five factors to be particularly helpful on the issue of causation. An affirmative vote is more likely when the following conditions are present: (1) a large and increasing market share; (2) a high margin of dumping or subsidization; (3) homogeneous products; (4) declining domestic prices, and (5) barriers to entry. *See* Certain Red Rasberries from Canada, Inv. No. 731–TA–196 (Final), USITC Pub. 1680 at 11–19 (1985) (Additional Views of Vice Chairman Liebeler). Four of these factors are discussed directly in the body of this opinion. She also notes that foreign supply elasticity is high as evidenced by Japan's substantial imports to the U.S. market. Given Japan's presence, it would not be rational for Canada to price discriminate and attempt to injure the U.S. industry.

Rectangular Pipes and Tubes from Canada (Final), supra, at 9 n.20.

Looking only at the language of this footnote, the Court finds little support for the plaintiffs' argument that Vice Chairman Liebeler substituted five factors for those contained in § 1677(7). The Vice Chairman stated that five factors are "*particularly helpful*" on the issue of causation. It cannot be fairly implied that Commissioner Liebler substituted these five factors for those which are enumerated at § 1677(7). It is rational to conclude that this footnote is incidental to the views elucidated in the plurality opinion.

The Court's conclusion finds additional support from consideration of this footnote in the context of the entire plurality opinion. In finding no material injury to the domestic industry by reason of the subject imports, the plurality (in which Vice Chairman Liebler was a member) clearly recognized the statutory requirement to consider "among other factors, the volume of imports, the effect of the LTFV imports on prices in the United States for the like product, and the impact of such imports on the relevant domestic industry." *Rectangular Pipes and Tubes from Canada (Final), supra* at 8–9 (footnote omitted).[13]

IV. Condition of the Domestic Industry

In finding there was no materiel injury to the domestic industry, Commissioners Stern, Liebeler, and Brunsdale based their determination primarily on the lack of causal connection between the imports from Canada and the condition of the domestic industry. *Id.* at 3. They found that the condition of the domestic industry improved significantly during the course of the investigation but based their negative determination primarily on an analysis of other casual factors. *Id.* at 8.

[13] Referring to Vice Chairman Liebeler's additional views in the *Red Raaberries* determination cited in footnote 20, plaintiffs contend that consideration of the five factors is unlawful since the factors derive from the erroneous assumption that only predatory pricing is actionable under the antidumping laws. According to the plaintiffs, Liebler treats these factors as "proxies" for predatory pricing information. Plaintiffs also argue that defendant's stated explanation for utilizing these factors is a post-hoc rationalization since it conflicts with the rationale given in *Red Rasberries.* Upon thorough consideration of this argument and in view of Vice Chairman Liebeler's apparent intention, the Court finds reference to *Red Rasberries* inappropriate in the instant case. Although it is generally appropriate to refer to the sources cited in support of a particular proposition, the language of the footnote indicates that Vice Chairman Liebeler was not relying upon the rationale given in *Red Rasberries.* Vice Chairman Liebler explicitly stated that "[f]our of these factors are discussed directly in the body of this [plurality] opinion." *Rectangular Pipes and Tubes from Canada (Final), supra,* at 9, n.20. Thus, it is appropriate to refer not to the rationale given in *Red Rasberries* but rather the rationale given in the plurality opinion.

In discussing the condition of the domestic industry, Commissioners Stern, Liebeler, and Brunsdale noted that domestic production of H–WR rose from 289,502 short tons in 1982 to 444,698 in 1984 and that domestic production for the interim period of January–September, 1985 was 8% higher than it was during the same period in 1984. *Id.* at 5–6. The Commissioners also noted that U.S. producers' domestic shipments increased from 300,469 tons in 1982 to 438,151 tons in 1984. For the interim period of January–September, 1985, Commissioners Stern, Liebeler, and Brunsdale found that shipments were 10% greater than shipments in the corresponding period of 1984. With regard to domestic productive capacity utilization, the Commissioners cited an increase of 26.3% in 1982 to 40.6% during the interim period of 1985. *Id.* at 6.

Commissioners Stern, Liebeler, and Brunsdale also noted that the number of production and related workers for H–WR increased throughout the period of investigation. They observed that wages paid, total compensation, and labor productivity increased. *Id.* at 7.

These Commissioners concluded that the financial performance of the domestic industry improved irregularly throughout the period of investigation. They noted that the industry posted net operating losses of $11.6 million in 1982 but posted net operating income of $2 million during the interim period of 1985. *Id.*

With regard to the productive capacity and capital expenditures, Commissioners Stern, Liebeler, and Brunsdale made the following observations:

> Domestic producers increased their installed productive capacity by more than 8% from 1982–84. During January–September 1985, domestic productive capacity decreased approximately 1 percent compared to the corresponding period of 1984.
>
> * * * * * * *
>
> The industry has increased its productive capacity over the period of investigation in spite of low capacity utilization. It has invested significant sums in capital expenditures, especially machinery and equipment used to produce H–WR. Thus, the domestic industry does not consider current levels of capacity utilization to bar a modernization and is willing to incur costs to buy new machinery, presumably because the producers expect to be able to use that new machinery profitably to lower costs and expand output.

Rectangular Pipes and Tubes from Canada (Final), supra, at 6–8 (footnotes omitted).

Plaintiffs do not dispute that there is substantial evidence in the record to support the finding that production, shipments, capacity utilization, and profits increased between 1982 and the first nine months of 1985. Plaintiffs' Reply Brief at 30, *Copperweld Corp.* v. *United States,* Court No. 86–03–00338. Instead plaintiffs argue that the evidence in the record does not support the conclusion that domestic producers increased their installed productive capacity by

more than 8% from 1982–84. Plaintiffs apparent concern is that not all of the firms in the industry increased their productive capacity. In the plaintiffs' view, the ITC should make a company-by-company analysis of the condition of the industry.

Section 1673(b)(1) requires that the ITC make and publish a final determination of whether a "domestic industry" is materially injured by reason of the subject imports. The domestic industry is further defined as "the domestic producers *as a whole* of the like product * * *." 19 U.S.C.A. § 1677(4)(A) (1980 & Supp. 1986). This language makes manifestly clear that Congress intended the ITC determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports. This language defies the suggestion that the ITC must make a disaggregated analysis of material injury. Furthermore, it appears that if Congress had intended that the ITC analyze injury on a disaggregated basis, Congress would have made this intention explicit, as it did for example in regard to regional industries.[14]

Plaintiffs also contend there is insufficient evidence in the record to support the finding that the domestic industry has invested significant sums in capital expenditures. According to the plaintiffs, capital expenditures actually declined precipitously during the period of investigation. Plaintiffs dispute the suggestion that "producers expect to be able to use [the] new machinery profitably to lower costs and expand output."

After careful review of the data gathered by Commission investigators, the Court is unable to discern either a positive or a negative trend in capital expenditures including those for machinery and equipment. After an increase in 1983, total capital expenditures declined precipitously in 1984. And while expenditures during the interim period of 1985 were greater than those during the same period in 1984, these expenditures were nowhere near 1982–83 levels.

Nevertheless, the Court finds there is sufficient evidence in the record to support the finding that the domestic industry invested "significant" sums in capital expenditures and that the condition of the domestic industry improved during the course of the investigation. The plurality did not determine that capital expenditures *increased* during the period of investigation. They merely stated that capital expenditures were *significant*. As previously stated, there was undisputed evidence in the record that production, shipments, capacity utilization, wages paid, and labor productivity increased during the relevant period. Thus, even though the evidence in the record regarding capital expenditures is not determinative of the condition of the domestic industry, there is ample evidence in the

[14] With regard to regional industries, a disaggregated analysis is specifically authorized:

> material injury * * * may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a like product constitutes a major proportion of the total domestic production of that product, is not injured * * * if the producers of all, or almost all, of the production within that market are being materially injured * * *.

19 U.S.C.A. § 1677(4)(C) (1980 & Supp. 1986). *See Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556 (Fed. Cir. 1984).

record, owing to other factors, that the condition of the domestic industry improved over the course of the investigation.

V. Import Volume

In their causation analysis, a majority of the Commissioners found that the absolute volume of imports increased during the period of investigation. *Rectangular Pipes and Tubes from Canada (Final), supra,* at 10, 20–21. The Commissioners focused their analysis on the Canadians' relative share of the domestic market. Commissioners Lodwick and Rohr observed that "[t]he Canadian share of total imports has decreased. More importantly, however, Canadian imports, relative to the dynamic conditions of the industry, have been stable." *Id.* at 21. Commissioners Stern, Liebeler, and Brunsdale offered their own view of the situation:

> Imports from Canada, as a share of domestic consumption, have declined during the period of this investigation. Thus, although Canadian imports have increased absolutely, they have not taken market share from domestic producers. Domestic consumption has increased rapidly from 445,085 tons in 1982 to 701,555 tons in 1984 and from 539,506 tons during January–September 1984 to 578,354 tons during January–September 1985. Given the sharp increases in domestic consumption, *the absolute volume of imports is not a useful indicator of causation.*

Id. at 9–10 (footnotes omitted).

Plaintiffs contend the conclusion that "the absolute volume of imports is not a useful indicator of causation," is not in accordance with law. According to the plaintiffs, such a conclusion conflicts with the statutory requirement that the absolute volume of imports be considered.

Section 1677(7)(C)(i) specifies that in evaluating the volume of imports, the ITC "shall consider whether the volume of imports of the merchandise, or any increase in that volume, *either in absolute terms or relative to production or consumption,* in the United States, is significant."

This language when read in conjunction with the legislative history indicates that disjunctive language was chosen to signify congressional intent that the agency be given broad discretion to analyze import volume in the context of the industry concerned:

> It is expected that in its investigation the Commission will continue to focus on the conditions of trade, competition, and development regarding the industry concerned. For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.

S. Rep. No. 249, 96th Cong., 1st Sess. at 88, *reprinted in,* 1979 U.S. Code Cong. & Admin. News 381, 474.

In directing their attention to the relative share of the domestic market held by the Canadians, the majority of the Commissioners fulfilled their statutory duty to analyze the volume of imports in either an absolute *or* a relative sense depending upon what is appropriate under the circumstances. The majority's preference for relative import data, given the sharp increase in domestic consumption, was not only authorized but was reasonable.

Urging that the industry was in a state of injury during the entire investigation, plaintiffs object to the ITC's focus on declining import penetration levels. In the plaintiffs' view, "the commissioners did not seem to ask themselves whether a 12.8% market share might be an injurious level in 1983, and if so, why a 12.7% market share is not also injurious in 1985." Brief in Support of Motion for Judgment on the Agency Record at 72, *Copperweld Corp.* v. *United States,* Court No. 86–03–00338.

The ITC's focus on penetration levels, however, finds ample support in the language of the statute which authorizes consideration of whether the volume or any *increase* in that volume, either in absolute or relative terms is significant. This view is consistent with the ITC's authority to consider import volume with a focus on the "conditions of trade, competition, and development regarding the industry concerned." S. Rep. No. 249, 96th Cong., 1st Sess. 88, *reprinted in,* 1979 U.S. Code Cong. & Admin. News 381, 474. A focus upon declining import penetration levels is also consistent with the ITC's discretion to consider import penetration one factor among the many that affect the domestic industry. *See SCM Corp.* v. *United States,* 4 CIT 7, 13, 544 F. Supp. 194, 199 (1982).

VI. Lost Sales, Price Suppression, and Depression

In the preliminary determination, the Commissioners found that there was a reasonable indication that an industry in the United States was materially injured by reason of H–WR imports from Canada. *Rectangular Pipes and Tubes from Canada (Preliminary), supra,* at 3. The Commissioners concluded that the price of the Canadian product may be affecting the price of the domestic product. *Id.* at 7. This conclusion was based in part on the confirmation of "numerous lost sales to Canadian imports, many of which were lost on the basis of price." *Id.*

In the final determination, Commissioners Stern, Liebeler, and Brunsdale arrived at a different conclusion with regard to the evidence of lost sales:

> The Commission received 26 specific lost sales allegations from five U.S. producers, involving 21 purchasers. Although the Commission confirmed that price was one of several purchasing considerations by domestic purchasers, a significant number of purchasers emphasized reliability, delivery time, availability, and "service." Many purchasers stated that they consider the domestic producers to be the price leaders in the market.

Rectangular Pipes and Tubes from Canada (Final), supra, at 12–13 (footnotes omitted).

Referring to the staff reports of the preliminary and final investigations, plaintiffs urge that the discussions concerning lost sales are virtually identical in both reports except for an additional lost sale allegation in the final investigation. Plaintiffs question the propriety of the different conclusion reached by the plurality in the final determination.

In a preliminary determination, the ITC must ascertain whether there is a "reasonable indication" that a U.S. industry is materially injured by reason of the subject imports. 19 U.S.C. § 1673b(a) (1982). This standard is understood to impose a very low threshold for an affirmative determination. As the United States Court of Appeals for the Federal Circuit has stated, the ITC shall find no reasonable indication of material injury only when "(1) there is clear and convincing evidence of the absence of such reasonable indication; and (2) the record shows it extremely unlikely that evidence of a 'reasonable indication' would be developed in a final investigation." *American Lamb Co.* v. *United States,* 785 F.2d 994, 999 (Fed. Cir. 1986) (citations omitted).

By contrast, in a final investigation, the ITC is directed to determine whether an industry in the U.S. *is* materially injured by reason of the imports of merchandise at less than fair value. 19 U.S.C. § 1673d(b)(1)(A)(i) (1982). This standard is more exacting than that which is applicable in a preliminary determination. In a final investigation, the ITC must determine whether or not material injury actually exists; a "reasonable indication" of injury is never enough.

Thus, even though the staff reports in the preliminary and final investigation contain virtually identical discussions of the lost sales allegations, the plurality in the final investigation was properly discharging its duty to apply an evidentiary threshold that was higher than the standard applicable in the preliminary determination. In the final investigation, the ITC also had more extensive information available to it as evidenced by, for example, the purchasers' questionnaires. Finally, this Court has no authority to interfere with the plurality's discretion to make a reasonable interpretation of the evidence collected in the final investigation. *Maine Potato Council,* 9 CIT at 300, 613 F. Supp. at 1244.

As previously stated, the ITC received 26 specific lost sales allegations[15] from five U.S. producers involving 21 purchasers. Some of these sales allegations were confirmed. The ITC confirmed that a significant number of these sales were lost for reasons other than price, i.e. reliability, delivery time, availability, "service." With regard to the lost revenue allegations,[16] the ITC received 32 allegations from three U.S. producers involving 19 purchasers. Four of

[15] Lost sales allegations refer to the situation in which the domestic industry is unable to make a sale because of the presence of lower priced imports.

[16] Lost revenue allegations, by contrast, refer to the situation in which the domestic industry lowers its price to make a sale in the face of competition with the imported product.

these allegations were denied. Purchasers were unable to either confirm or deny the other allegations. *See Rectangular Pipes and Tubes from Canada (Final), supra,* at 12–13.

Plaintiffs criticize the plurality's use of the data involving lost sales, lost revenues, price suppression, and price depression. As a first argument, plaintiffs contend that a sale lost due to the provision by the foreign producer of a service that costs money to provide should still be considered a true lost sale. Plaintiffs further argue that the data is obtained from parties interested in the outcome of the determination; and therefore, the ITC should not draw adverse inferences from this data against the domestic industry.

Although it would certainly be appropriate for the agency to give consideration to plaintiffs' concerns, the plurality considered the data of lost sales, lost revenues, price suppression, and price depression among the many factors bearing on the question of the affect of the price and impact of the imports on the domestic industry. With regard to lost sales, there is no statutory provision which requires the ITC to perform any particular type of analysis. *Maine Potato Council,* 9 CIT at 302, 613 F. Supp. at 1245. Furthermore, the plurality treated the lost sales data with caution: "We note that the presence or absence of confirmed lost sales is rarely determinative or persuasive on the question of a casual link between LTFV imports and material injury to the domestic industry." *Rectangular Pipes and Tubes from Canada (Final), supra,* at 12 n.28.

The record also contains substantial evidence gauged from a wealth of sources that the domestic H–WR market was highly competitive.[17] A clear majority of the Commissioners were unable to discern an overall pattern of price underselling by the Canadian imports. They found that purchasing decisions were influenced by factors other than price and that domestic producers were more often the price leaders in the market. *Id.* at 10–13, 23.

VII. Capacity Utilization and Profitability

In the final determination, Commissioners Stern, Liebeler, and Brunsdale made the following comments in regard to the low levels of capacity utilization and profitability experienced by the domestic industry:

> Recent increases in domestic production and shipments have not led to significant increases in profitability. Although operating income as a percent of sales improved markedly after 182,

[17] In discussing price comparisons, the ITC staff cited the following as evidence of the highly competitive nature of the domestic market:

> The highly competitive nature of the domestic market for these products, attested to by numerous customers as well as producers, is reflected in the mixed pattern of prices of U.S. producers and Canadian importers revealed in the information gathered both from the producers and from purchasers. Some of the time one source has the lowest price, some of the time the other does, but on average their prices are quite similar.
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> * * * * * * *
>
> In connection with lost sales allegations and purchaser questionnaires, at least 10 customers of the products under investigation were contacted by telephone by the Commission staff and asked to describe the nature of the market and the pricing practices of the U.S. producers and Canadian importers. In these discussions, the consensus emerged that the market is highly competitive and would be so even in the absence of LTFV imports from Canada. The purchasers more often characterized the U.S. producers as more aggressive price cutters than the Canadians, viewing the prices of Canadian imports as more likely to follow than to lead.

Rectangular Pipes and Tubes from Canada (Final), supra, at A–31.

there has been little change in this profit measure since 1983. These results are explained by the low levels of capacity utilization discussed above, which suggest that substantial expansion in the demand for domestic output would not have much effect on domestic prices in the short run.[27] Thus, even assuming that the total volume of Canadian imports were to decline substantially and assuming that the entire decline were captured by the domestic producers, domestic capacity utilization would not be raised sufficiently to have a significant effect on profit margins in the industry.

[27] Based on the information obtained in this investigation we believe that the domestic H–WR industry is competitive, capital-intensive and that the short-run supply curve is highly elastic in the relevant range. *See* testimony of Dr. Leone, Transcript of the hearing (TR.) at 71.

Rectangular Pipes and Tubes From Canada (Final), supra, at 11–12 (footnote omitted). Citing an improvement in profits from 1982 to 1983, plaintiffs disagree with the plurality's conclusion that profitability would not be effected if the Canadian market share were captured by the domestic industry. Plaintiffs assert that improvements in capacity utilization can and have had a positive effect on profits so that a substantial capture of the Canadian market share by domestic producers is likely to be quite beneficial.

As previously stated, the evidence in the record established that the domestic industry is highly competitive and operating at low levels of capacity utilization. A majority of the Commissioners, after examining a substantial amount of pricing data, characterized the domestic industry as having a mixed pattern of underselling and overselling without clear evidence of price leadership.

To supplement the evidence in the record, Titan presented expert testimony of Robert A. Leone.[18] Dr. Leone examined the domestic H–WR industry and the role of the Canadian imports. Dr. Leone analyzed the profitability data. He compared price and cost data and price and output levels. He concluded that the domestic industry was operating in the highly elastic[19] portion (relatively horizontal portion) of the supply curve. Dr. Leone observed that as long as the domestic industry is operating at a low level of capacity utilization, in theory, two phenomena will occur: (1) little upward price pressure with volume increases; and (2) low profits overall and little variation in profit with volume. Pub. Doc. 63 at 36.

The Court finds the evidence in the record which includes Dr. Leone's economic analysis substantiates the findings of the plurality. Between 1983 and the first nine months of 1985, capacity utilization increased from 32.2% to 40.6%. *Rectangular Pipes and Tubes from Canada (Final), supra,* at A–8. At the same time, there was little change in profits. *Id.* at A–14. The mere fact that operating income as a percent of sales improved between 1982 and 1983 does not detract from the conclusion that a substantial increase in demand and

[18] Dr. Leone holds a Ph.D. in Economics from Yale University. He assisted the ITC in preparng a complete economic analysis of the impact on the domestic industry of steel products from Canada for a Section 201 investigation. *See Carbon and Certain Alloy Steel Products,* Inv. No. 201–TA–51 (1984).

[19] Elasticity of supply refers to the relationship between a change in price and a change in the willingness of competitors to supply a given product. Pub. Doc. 63 at 30.

capacity utilization will not have much effect on domestic prices and profitability in the short run.

Taking issue with the plurality's reliance upon Dr. Leone's economic analysis, plaintiffs contend that the analysis curiously omits reference to demand for H–WR. Whether or not demand was an integral part of the analysis, the Court finds the theoretical supply curve constructed by Dr. Leone was borne out in practice. Empirical evidence established that prices, once adjusted for cost changes, did not increase after 1982 despite substantial increases in volume. Pub. Doc. 63 at 36. This evidence reflected the actual interplay of supply and demand for H–WR. Furthermore, the staff report noted that as demand, production, and capacity utilization increased, profits remained negligible. *Rectangular Pipes and Tubes From Canada (Final), supra,* at A–14.

Plaintiffs also challenge Dr. Leones' assertion that when an industry is operating at low levels of capacity utilization, even a modest increase in price can induce large increases in supply. Plaintiffs contend this assertion suggests that domestic producers are holding back on supply because prices are low. In the plaintiffs' view, if prices increase without an increase in demand, then the industry will not suddenly supply a greater quantity of H–WR. Although supply of a given product is in part dependent upon the demand for the product, it is evident that plaintiffs mischaracterize Dr. Leone's assertion. His assertion was made in the context of and to elaborate upon a discussion regarding supply elasticity. It was based entirely in theory. Dr. Leone may have assumed the supply of the product would be met with a corresponding increase in demand for the product. *See* Pub. Doc. 63 at 30.

Plaintiffs criticize Dr. Leones' conclusion that since coil costs fell as did prices, prices are actually stable and the Canadian's did not itensify price pressures. Citing the testimony of Roy Herman of plaintiff, UNR–Leavitt, plaintiffs assert that prices did not follow costs.

Dr. Leone began his analysis with the observation that the domestic H–WR market is highly competitive, an observation which finds overwhelming support in the record. *See supra* note 17. He noted that in a highly competitive market, cost changes would be expected to translate quickly into price changes. Pub. Doc. 63 at 33. From a qualitative perspective, Dr. Leone asserted that an increase in the number of producers resulting from the Canadian market presence would intensify the degree of competition in the industry. *Id.* at 29. He noted that an increase in the number of suppliers, in theory, would add to the elasticity of supply. Dr. Leone observed that the more elastic an industry's supply curve, the more intense the downward competitive pressure on prices. *Id.* at 30. Finally, Dr. Leone noted that when a highly competitive industry is operating in the relatively flat (highly elastic) portion of its supply curve, certain behavior will be observed. According to Dr. Leone, this behavior in-

cludes prices being closely tied to short-run costs, intense pressures on productivity and wage restraints, low total profits, and stable or decreasing employment. He concluded that if this behavior is observed and it would be expected to occur in the absence of Canadian competition, it follows that Canadian imports have neither created nor intensified the competitive conditions in the market. *Id.* at 35.

The evidence in the record establishes that labor productivity increased and unit labor costs declined during the period of investigation. *Rectangular Pipes and Tubes From Canada (Final), supra,* at Table 6. The evidence also indicated that H–WR industry experienced low total profits. The actual data gathered by the ITC therefore demonstrates the existence of the behavior Dr. Leone expected would occur. The mere fact that plaintiffs' witness alleged that costs were increasing does not, in and of itself, establish that Dr. Leone's conclusion that Canadian market presence intensified the price pressures in the domestic market is flawed.

Plaintiffs criticize Dr. Leone's response to questions regarding new entrants. Dr. Leone testified that new entrants would take the same price that is determined by competitive conditions in the market. In the plaintiffs view, the ITC has been through enough cases to know that new entrants must use price to gain entry in the market.

Whether or not the ITC "knows" such a thing is irrelevant since the evidence shows that purchasers of Canadian imports valued non price factors (e.g. delivery, product availability, quality, and service). *Id.* at A–31. In view of this evidence, plaintiffs' unsupported allegation that new entrants must use price to gain entry into the market is totally unfounded. The plaintiffs in fact recognized this likelihood when they asserted that "buyers have no incentive to buy from someone new *(assuming service and quality is (sic) similar)* * * *." Brief in Support of Motion for Judgment on the Agency Record, *supra,* at 83 (emphasis added).

Plaintiffs further criticize Dr. Leone's assertion that if the U.S. industry captured the Canadian market share, prices would remain unchanged and that therefore Canadian imports have not caused injury. Plaintiffs contend that U.S. producers would benefit enormously from the extra volume even without price increases. In the plaintiffs' view, Dr. Leone's analysis might argue against a finding of *serious* injury, but does not demonstrate the absence of the low level of injury necessary under the antidumping laws. This standard, according to the plaintiffs, requires material injury caused to a significant degree by the unfairly traded imports.

The Court has previously upheld the plurality's conclusion that if the U.S. industry captured the total volume of Canadian imports, capacity utilization would not be raised sufficiently to have a significant effect on profit margins. This conclusion was made in support of the plurality's finding and supported by Dr. Leone's economic analysis that the domestic industry did not incur material injury by

reason of the LTFV imports of H–WR from Canada. It was made against a finding that the H–WR industry is highly competitive. In view of the entire record compiled by the ITC, the Court will not accept the plaintiffs' unsupported allegation that plaintiffs would in fact benefit from a volume increase without a corresponding price increase. It bears repeating that an ITC determination of material injury or threat of material injury is presumed correct. The burden of proving otherwise rests with the party challenging it. 28 U.S.C. § 2639(a)(1).

VIII. Threat of Material Injury

In the final determination, the plurality, with which Commissioners Lodwick and Rohr concurred, concluded that there is no threat of material injury by reason of H–WR imports from Canada:

> There is no evidence of record in this investigation that the Canadian producers intend to increase their share of the U.S. market. In fact, their 1986 marketing plans, which include only modest increases in shipments to the United States, will lead to a decreased relative presence in the U.S. market.[37] There is no information that any Canadian mill intends to divert production to the United States.
>
> We note that a new firm, Transamerican, has entered the domestic market for H–WR. The firm intends to import and sell Canadian H–WR. This does not alter our conclusion that there is no threat of injury. This new firm can only sell the product that is made available to it by Canadian mills, has no established track record in the United States, and will have to compete in an already crowded market. Thus, it is highly unlikely that the firm will have any significant impact on the market in the foreseeable future.

[37] There is no information of record that the increases in domestic consumption will abate during 1986.

Rectangular Pipes and Tubes from Canada (Final), supra, at 16.

Plaintiffs contend the statement in footnote 37 that "[t]here is no information of record that the increases in domestic consumption will abate during 1986," is absolutely wrong. In this regard, plaintiffs assert that there is no information of record that domestic consumption will increase in 1986, while there is information that such consumption will not increase. Plaintiffs allude to the statement of William Nostrand, President of the plaintiff company, Welded Tube Company of America that "industry forecasts show that these market segments for our products will remain flat for the next year or two." Pub. Doc. 72 at 15. In response, the defendant contends that there was good reason to doubt the plaintiffs' forecast since plaintiffs' earlier forecasts had proven to be inaccurate. The defendant points out that during the preliminary investigation in early 1985, the plaintiffs erroneously predicted that the 1984 recovery would be short-lived and that the market would deteriorate in 1985.

A finding of threat of material injury must be based on evidence that the threat of injury is "real and that actual injury is immi-

nent." Such a determination may not be based on mere supposition or conjecture. 19 U.S.C. § 1677(7)(F)(ii). On the other hand, an examination of threat of injury is necessarily predictive since it must assess the future course of imports and their effect upon the domestic industry. Since there was evidence that domestic production increased more than 71% from 1982 to 1985, *see Rectangular Pipes and Tubes from Canada (Final), supra,* 5–6, and since plaintiffs' earlier forecast had proven to be inaccurate, the Court finds reasonable the defendant's reliance upon its own forecast that the domestic market would continue to grow in 1986.

Plaintiffs also criticize the plurality's use of the Canadian producers' forecast of home market sales. In the plaintiffs' view, this information is speculative and should not be probative evidence of a lack of threat. It is the plaintiff's own argument, however, that is speculative. The plurality found that "the Canadian firms from which we have information have indicated an intention to significantly increase their domestic sales." *Rectangular Pipes and Tubes from Canada (Final), supra,* at 17. There was also evidence that home market sales increased at an annual rate of 24% from 1982 to 1985. In view of this evidence, the defendant's prediction that this trend would continue was reasonable.

Plaintiffs criticize the plurality's statements that "[t]here is no information that any Canadian mill intends to divert production to the United States," and that the producers' 1986 marketing plans include only "modest" increases in shipments to the United States. Referring exclusively to the data on capacity and shipments submitted by one Canadian manufacturer, and to the presence of Transamerican as an importer of Canadian H–WR, plaintiffs contend that the ITC should have found a threat of significantly increased imports from Canada.

The evidence in the record, however, establishes that from 1982 to 1985, as production of H–WR in Canada rose, home market sales rose at an even faster pace. Furthermore, as the plurality noted: "H–WR imports from Canada have been present in the U.S. market for some time and they have maintained a stable market presence. Their actual share of apparent domestic consumption has declined irregularly over the course of the investigation * * *." *Rectangular Pipes and Tubes from Canada (Final), supra,* at 15. The staff also reported that while capacity data was not available for the six firms, three of the firms reported an average annual increase in production capacity of only 4% from 1982 to 1985. *Id.* at A–18. Without expressing any opinion as to the relationship between Transamerican and a Canadian manufacturer,[20] the Court observes that although this Canadian manufacturer planned to increase its exports, this

[20] Plaintiffs suggest that the presence of Transamerican through special pricing deals offered by it, demonstrates the existence of a significant threat of material injury to the domestic industry. This assertion seems conjectural at best. Furthermore, Transamerican has no established track record. It must compete in an already crowded and competitive market. As the ITC correctly reasoned, the presence of Transamerican, does not establish that "the threat of injury is real and that actual injury is imminent." § 1677(7)(F)(ii).

same manufacturer planned to significantly expand its home market sales. At least two other Canadian firms planned to decrease their exports. It is evident that any adverse impact of these imports would be mitigated by the fact that the domestic market would continue to grow in 1986. In addition, it appears there has been no shift in emphasis in Canadian production towards the U.S. market. From the evidence gathered by the Commission, the Court finds the plurality's conclusions regarding Canadian capacity and shipments are supported by substantial evidence in the record and are otherwise in accordance with law.

With regard to capacity, plaintiffs also assert that the ITC did not take into account or rely upon revised figures on capacity in Conf. Doc. 37.D (Dennis Rapkin's copy of January 16, 1986). Plaintiffs assert that the ITC should have considered revised data for three firms providing complete data.

The total amounts written on the worksheets of Conf. Doc. 37.D were the figures considered and relied upon by the ITC. *Compare* Conf. Doc. 19 at A–24 *with* Conf. Doc. 32 at A–23. Regardless of what the evidence for the three firms providing complete data shows, the ITC analyzed data for five firms providing complete data. Plaintiffs' attempt to require the ITC to draw a favorable conclusion from selected capacity data fails as a matter of law. The ITC has discretion to make a reasonable interpretation of the facts. *See, e.g., Sprague Electric Co.* v. *United States*, 2 CIT 302, 310, 529 F. Supp. 676, 683 (1981).

CONCLUSION

For the reasons given above, the Court holds that the ITC's determination in *Rectangular Pipes and Tubes from Canada (Final), supra*, is supported by substantial evidence in the record and is otherwise in accordance with law. Accordingly, the plaintiffs' motion for judgment on the agency record is denied.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	
C88/41	Carman, J. February 25, 1988	A.N. Deringer, Inc.	86-3-00284	Various item numbers and rates	
C88/42	Carman, J.	E. Dillingham, Inc.	86-3-00285	Various item numbers and rates	
C88/43	Carman, J. February 25, 1988	F.W. Myers & Co.	86-3-00277	Various item numbers and rates	
C88/44	Carman, J. March 2, 1988	Pharmacia, Inc.	86-2-00246	Item 712.49 6.8%	
C88/45	Rao, J. March 4, 1988	Applied Motion Products, Inc.	83-6-00908	Item 682.25 10.3%	

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
Item 771.15 Free of duty for certain waste nylon film Item 793.00 Free of duty for various flakes or chunk waste and fines	Agreed statement of facts	New York Certain waste nylon film or various flakes or chunk waste and fines
Item 771.15 Free of duty for ground waste nylon film Item 793.00 Free of duty for various flakes or chunk waste and fines	Agreed statement of facts	Ogdensburg Ground waste nylon film or various flakes or chunk waste and fines
Item 771.15 Free of duty	Agreed statement of facts	Champlain Ground waste nylon film
Item 661.95 4.5% Item 66.68 4.9%	Pharmacia Fine Chemicals, Inc. v. U.S., 9 CIT 438 (1985)	New York "Gel Destainer GD 4"
Item 682.30 5.3%	Agreed statement of facts	San Francisco Stepper motors

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
V88/7	Tsoucalas, J. February 1, 1988	Puma USA, Inc.	82-8-01220	Export value
V88/8	Tsoucalas, J. February 1, 1988	Puma USA, Inc.	83-3-00340	Export value
V88/9	Tsoucalas, J. February 1, 1988	Puma USA, Inc.	83-8-01167	Export value
V88/10	Tsoucalas, J. February 1, 1988	Puma USA, Inc.	83-8-01173	Export value
V88/11	Restani, J. February 3, 1988	Beloit Corp.	85-5-00725	Appraised at values rates of duty high than asserted by importer at times entry

ON	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Represented by appraised value for Styles 91550 and 90710 and by appraised values less 25% for Style 90685 and 90685W	Agreed statement of facts	Cleveland Footwear
	Represented by appraised value net packed for Style 90732, 90693W, 90710, and 90740, and by appraised value less 25% packed for Styles 90685, 90685W, 90426, 90326, 90680W, 90681S and 90681J and by manufacturers values of $6.03 per pair net packed and $6.35 per pair net packed for 3200 pairs of mens sizes for Style 90300	Agreed statement of facts	Savannah Footwear
	Appraised value for Styles 90693W and 90688W and by appraised values less 25% for Styles 90681J, 90426, and 90326	Agreed statement of facts	New York Footwear
	Appraised value or appraised value less 25%	Agreed statement of facts	Los Angeles Footwear
es and gher s of	Appraised and dutiable at values and rates of duty asserted by importer at times of entry	Agreed statement of facts	New York Various types of machines and parts of paper making machines

ABSTRACTED VALUA

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS O VALUATIO
V88/12	Watson, J. February 4, 1988	Mercury Radio & Battery Corp.	R64/17224, etc.	Export value
V88/13	Watson, J. February 9, 1988	Brothers Trading Corp.	R59/5990	Export value
V88/14	Watson, J. February 9, 1988	National Carloading Corp.	R61/10204, etc.	Export value
V88/15	Watson, J. February 9, 1988	W.J. Byrnes & Co.	R63/5235, etc.	Export value
V88/16	Watson, J. February 11, 1988	W.J. Byrnes & Co.	R63/2092, etc.	Export value
V88/17	Watson, J. February 16, 1988	Mitsui & Co.	R66/17056	Export value
V88/18	Watson, J. February 16, 1988	Sekiya & Co.	R59/11208	Export value
V88/19	Watson, J. February 18, 1988	Texas Instruments, Inc.	82-11-01513	Constructed value
V88/20	Carman, J. February 19, 1988	North American Foreign	85-2-00195	Drawback claimed
V88/21	Carman, J. March 1, 1988	MCF Footwear Corp.	84-3-00467	American selling

ATION DECISIONS — Continued

OF ION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts
	Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles Silk fabric
	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts
	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios together with their accessories and parts
	Appraised values less 7.5%	Agreed statement of facts	San Francisco Radios & parts
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Double knitted fabrics, etc.
	Appraised values less 7.5%	Agreed statement of facts	New York Silk fabric
ie	Said value is 44.756% of entered value (net of all allowances under item 807.00)	Agreed statement of facts	Dallas Semiconductor devices
ed	Drawback pursuant to 19 U.S.C.A. 1313(c) is properly payable on the "bands"	Agreed statement of facts	New York Gold plated band portion of imported articles (solid state timepieces)
price	Appraised values less 22%, per pair	Agreed statement of facts	New Orleans Footwear

Appeals to the U.S. Court of Appeals for the Federal Circuit

PPG Industries, Inc. *v.* United States, 11 CIT ——, Slip Op. 87–57 (May 15, 1987), *appeal docketed,* No. 88–1175 (Fed. Cir. Jan. 15, 1988).

Bantam Travelware *v.* United States, 11 CIT ——, Slip Op. 87–131 (Dec. 3, 1987), *appeal docketed,* No. 88–1217 (Fed. Cir. Feb. 1, 1988).

Convertors Division of America Hospital Supply Corp. *v.* United States, 11 CIT ——, Slip Op. 87–123 (Nov. 5, 1987), *appeal docketed,* No. 88–1185 (Fed. Cir. Jan. 20, 1988).

Far Eastern Department Store U.S.A., Inc. *v.* United States, 11 CIT ——, Slip Op. 87–138 (Dec. 11, 1987), *appeal docketed,* No. 88–1224 (Fed. Cir. Feb. 8, 1988).

BMT Commodity Corp. *v.* United States, 11 CIT ——, Slip Op. 87–126 (Nov. 19, 1987), *appeal docketed,* No. 88–1188 (Fed. Cir. Jan. 22, 1988).

Channel Master *v.* United States, 11 CIT ——, Slip Op. 87–129 (Nov. 25, 1987), *appeal docketed,* No. 88–1213 (Fed. Cir. Feb. 1, 1988).

Fundicao Tupy, S.A. *v.* United States, 12 CIT ——, Slip Op. 88–3 (Feb. 11, 1988), *appeal docketed,* No. 88–1233 (Fed. Cir. Feb. 11, 1988).

Gilmore Steel Corp. *v.* United States, 11 CIT ——, Slip Op. 87–112 (Oct. 6, 1987) & Final Order (Jan. 7, 1988), *appeal docketed,* Nos. 88–1242, 88–1243 (Fed. Cir. Feb. 18, 1988).

Decisions of the U.S. Court of Appeals for the Federal Circuit

National Corn Growers Ass'n *v.* United States, 10 CIT ——, Slip Ops. 86–55, 86–80, 86–112, (May 22, Aug. 5 & Nov. 3, 1986), *reversed & remanded,* Nos. 87–1147, 87–1148, 87–1149, 87–1160 (Fed. Cir. Feb. 9, 1988).

Index

Customs Bulletin and Decisions
Vol. 22, No. 12/13, March 30, 1988

U.S. Customs Service

Treasury Decision

	T.D. No.	Page
Tuna fish tariff-rate quota for calendar year 1988	88–11	1

General Notice

	Page
Interest rate, current IRS, used in calculating interest on overdue accounts and refunds	3

Proposed Rulemaking

	Page
Tamiami Airport, Miami, FL, proposed designated airport; part 6, CR amended	5

U.S. Court of Appeals for the Federal Circuit

	Appeal No.	Page
E.C. McAfee Co. and St. Paul Fire and Marine Insurance Co. *v.* United States	87–1441	9
Fundicao Tupy S.A. *v.* United States and Cast Iron Pipe Fittings Committee	87–1570	16
Omni U.S.A., Inc. *v.* United States	87–1602	19

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Copperweld Corp. *v.* United States	88–23	63
Coraggio Design, Inc. *v.* United States	88–22	57
Fabricas El Carmen, S.A. *v.* United States	88–20	44
Jay-Arr Slimwear Inc. *v.* United States	88–21	48
Tomoegawa USA, Inc. *v.* United States	88–17	27
United States *v.* Kingshead Corp.	88–19	42
United States *v.* Lun May Co.	88–18	38

Abstracted Decisions

	Page
Classification	92
Valuation	93

CAFC-Related Decisions/Appeals

	Page
Appeal to the CAFC	95
Decisions of the CAFC	95

*U.S. G.P.O. 1988-201-627:40081